

1 UNITED STATES DISTRICT COURT.
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3
4 MICROSOFT CORPORATION,)
5 Plaintiff,) C10-1823-JLR
6 v.) SEATTLE, WASHINGTON
7 MOTOROLA INC., et al,) August 27, 2013
8 Defendant.) TRIAL
9)

10 VERBATIM REPORT OF PROCEEDINGS
11 BEFORE THE HONORABLE JAMES L. ROBART
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14
15
16 For the Plaintiff: Arthur Harrigan, Christopher
17 Wion, David Pritikin Richard
18 Cederoth, Andy Culbert, Nathaniel
Love and Ellen Robbins

19
20 For the Defendants: Ralph Palumbo, William Price
21 Brian Cannon, Kathleen Sullivan
22 Andrea Roberts and Philip McCune
23
24
25

EXAMINATION INDEX

EXAMINATION OF		PAGE
JON DEVAAN	DIRECT EXAMINATION	12
	BY MR. HARRIGAN	
	CROSS EXAMINATION	26
	BY MR. PRICE	
DAVID TREADWELL	DIRECT EXAMINATION	34
	BY MR. CEDEROTH:	
	CROSS EXAMINATION	47
	BY MR. PRICE:	
	REDIRECT EXAMINATION	56
	By Mr. Cederth:	
	REDIRECT EXAMINATION	57
	By Mr. Price:	
KIRK DAILEY,	DIRECT EXAMINATION	59
	By Mr. Pritikin:	
	CROSS EXAMINATION	143
	BY MR. PRICE	

EXHIBIT INDEX

EXHIBITS ADMITTED	PAGE
2	67
1	74
16	143
7239	163
7240	165
7274	192
7252	195

1 THE COURT: Mr. Harrigan, I understand Microsoft has
2 a matter they want to take up before the jury comes in.

3 MR. HARRIGAN: Mr. Pritikin will address that, Your
4 Honor.

5 MR. PRITIKIN: Good morning, Your Honor.

6 THE COURT: Good morning, Mr. Pritikin.

7 MR. PRITIKIN: There are a couple of documents that
8 Motorola indicated it plans to use with Mr. Dailey, and we
9 thought it would be appropriate to address these now. I
10 think there were four documents, Your Honor, that are at
11 issue here.

12 THE COURT: I should also note -- to interrupt you
13 for a moment -- we have a motion from Qualcomm, apparently on
14 confidential documents, that was filed. I don't know who is
15 going to use them or when, but we need to make sure that we
16 get that covered prior to that happening.

17 MR. PRITIKIN: I don't believe we intend to, Your
18 Honor.

19 THE COURT: Mr. Price?

20 MR. PRICE: I don't think we intend to either, Your
21 Honor. But we'll certainly let you know if I learn that we
22 are.

23 THE COURT: Please continue, Mr. Pritikin.

24 MR. PRITIKIN: Let's start with the first two
25 documents. These relate to the VTech license which was the

1 subject -- this relates to the VTech license, if Your Honor
2 recalls, was the result of extensive testimony during the
3 November trial. And the first of these is the VTech license
4 that was discussed extensively in the findings of fact. The
5 second, Exhibit 2832, is an e-mail where VTech supposedly
6 asked for the 802.11 and H.264 license, also discussed
7 extensively in the court's findings of fact.

8 We think it is improper to offer these in the course of
9 this trial. Apparently what Motorola wants to do is to argue
10 that these implicitly endorse the 2.25 percent royalty. That
11 issue -- the ship has sailed on that. That's the issue that
12 was litigated last fall. And we don't think we should be in
13 a position of relitigating that now. So we would ask that
14 these documents be excluded.

15 Should I treat them all at once, Your Honor?

16 THE COURT: Yes.

17 MR. PRITIKIN: The next is the RIM license. And
18 this, too, is deja vu all over again. There are extensive
19 findings made by the court on the RIM license. Like the
20 VTech license, the court ruled that this does not support a
21 2.25 percent royalty. And, again, that's kind of the
22 impression, the innuendo they want to leave with the jury by
23 using it. Again, we don't think they should be offered or
24 used in this case. Those are the first three documents, Your
25 Honor.

1 The last document -- and again, I can hand up the specific
2 findings if it would be helpful to remind the court of what
3 you ruled, but I think you probably have it well in mind.

4 THE COURT: You're going to have to do that, because
5 I'm going to ask you, if you say this is inconsistent with a
6 prior ruling, you give me the number of that ruling.

7 MR. PRITIKIN: Absolutely, Your Honor.

8 With respect to the VTech license, the findings that we
9 would reference --

10 THE COURT: VTech is 420. I have that in front of
11 me.

12 MR. PRITIKIN: 420. But there are others that
13 surround that that are also important and relevant to that.

14 THE COURT: I think you want to look at 416, 414,
15 415, 418.

16 MR. PRITIKIN: VTech is 420, 16, 14, 415, 418, 417,
17 413.

18 THE COURT: All right.

19 MR. PRITIKIN: And for the RIM license, I would
20 direct the court to findings -- these are not in order -- but
21 435, 426, 430, 431, 425, 429, 432, and 433. The bottom line
22 was the court concluded with respect to each of them that
23 they are not an indicator as to what is, in fact, an
24 appropriate RAND royalty rate for the 802.11 and H.264 patent
25 portfolios. Among other things --

1 THE COURT: I understand your position.

2 MR. PRITIKIN: You understand our position. Sure.

3 All right. And the other document that they've indicated
4 they intend to use with Mr. Dailey is Exhibit 7243. And I
5 think we've given you a copy of that, Your Honor.

6 And this was attached to a declaration that Mr. Dailey had
7 provided in the Apple versus Motorola case. And if you look
8 at the article that is Exhibit 5, it's highly objectionable
9 on many grounds and is rank hearsay. It's an article that
10 appeared in Le Nouvel, and it's on royalty rates and
11 licensing strategies for essential patents and
12 telecommunication standards. And I suspect the reason they
13 want to use it is to say, well, there's an article saying
14 that Motorola asks for 2.25 percent on its telecommunication
15 standards, and there's data in here on what other companies
16 are asking for on telecom standards.

17 It is irrelevant and prejudicial under 403 and creates a
18 sideshow in these proceedings. That's our position simply
19 stated on those documents, Your Honor.

20 THE COURT: All right. Mr. Price. Why don't you
21 start with the VTech license, please.

22 MR. PRICE: Sure, Your Honor. You started with the
23 most difficult one, I understand. The VTech --

24 THE COURT: It was the first one handed up, that's
25 how I chose.

1 MR. PRICE: I understand counsel is afraid that we're
2 going to argue from VTech the appropriate rate is 2.25. And
3 that's not going to be the argument at all. What Mr. Dailey
4 -- and, Your Honor, this may be relevant for another witness
5 which we'll deal with on another day for a much different
6 topic. But for Mr. Dailey the purpose would be is to show
7 that he is being consistent -- and I know plaintiffs want to
8 say consistently wrong -- but consistent in his expectations,
9 in his good-faith expectations. This isn't being offered to
10 show that this is, in fact, the RAND rate. It's being
11 offered to show that that was, at the time, Mr. Dailey's
12 custom and practice to try to get value of about 2.25 percent
13 when he had these negotiations with other companies.

14 That also relates to the other documents in the following
15 way, Your Honor. Plaintiff has said, and I believe this
16 court has also found, that some of these licenses have a
17 number of technologies in them when they come to the final
18 rate. And that is actually our point. That is, when you
19 have the negotiations between these two companies, between
20 Motorola and Microsoft, although in the negotiations there
21 were discussions of 2.25 percent rates, that encompassed all
22 the technologies that were going to end up being in the
23 eventual license; or at least that was Mr. Dailey's
24 expectation while trying to negotiate to an eventual
25 zero-zero license.

1 And so this shows the thought process and the negotiation
2 strategy that Motorola used indiscriminately. And, again, I
3 know plaintiffs are going to say wrongfully, because this
4 comes as more than just this patent.

5 THE COURT: Why don't you turn to the RIM license.

6 MR. PRICE: The RIM license is a good example of
7 that, Your Honor. There's going to be evidence that, again,
8 that Motorola starts with a 2.25, that there are
9 negotiations, as are expected, and that at the end what you
10 get is a negotiation with a broader set of licenses. And
11 then you get a net royalty rate based upon that package of
12 licenses. And what Mr. Dailey is going to testify to is
13 that's the process and the custom and practice that he
14 expected here. He starts out with an expectation of what
15 they're going to get overall with the entire package of
16 patents that are going to be discussed in the discussions.
17 And then, of course, you're going to hear evidence, from
18 Mr. Gutierrez and Mr. Dailey both, that those are what the
19 discussions encompass, not just these standard essential
20 patents, but a panoply of patents.

21 THE COURT: Doesn't your original October offer
22 letter say that these are RAND rates, which would imply that
23 they're standard essential patents?

24 MR. PRICE: Yes. Yes. There's no question that
25 original letter -- which was sent in the context of

1 litigation and trying to put your patents forward -- says
2 these are essential patents --

3 THE COURT: You can spare me the "context of
4 litigation," counsel, the jury is not here. Let's just stay
5 with the facts.

6 MR. PRICE: That letter says 2.25 percent. These are
7 RAND essential patents. And it attaches the patents.

8 THE COURT: It strikes me the difficulty with your
9 position is that if you're offering to license the standard
10 essential patents for 2.25 percent, then -- and the
11 grant-back license that you're asking for is essential
12 patents of Microsoft, that would then value all of your other
13 patents as worthless.

14 MR. PRICE: Actually I think their expert testifies
15 to that. And I think that was Your Honor's problem with
16 VTech, is that you could write an agreement that basically
17 said that. But what the parties would tell you is during
18 negotiations they're valuing everything. And, quite frankly,
19 on Motorola's side they don't care, you know, whether you say
20 the WiFi and video compression are worthless, or whether you
21 say the wireless e-mail was worthless, or whether you say the
22 exchange sync patents that were asserted were worthless, or
23 the mapping patents were worthless. And these are all part
24 of the discussions between the two parties. All they care
25 about is the bottom line.

1 THE COURT: All right. I'm going to rule as follows
2 -- well, you've got an uphill path on the article and royalty
3 rates. But go ahead and give me your best shot.

4 MR. PRICE: Sure. The article on royalty rate isn't
5 being offered for a hearsay purpose. The article on royalty
6 rate is simply to make a point that it was well known that
7 that was Motorola's opening offer, not that that is a RAND
8 rate, but that it was well known in the industry that when
9 you negotiate with Motorola they start out in every
10 negotiation at 2.25 percent.

11 THE COURT: All right. I'm going to allow the use of
12 the VTech license with a limiting instruction. I think the
13 appropriate way to deal with the remainder of the argument
14 that Motorola wants to make is through cross examination.

15 I'm going to allow the RIM license with the same, a
16 limiting instruction, that is not an appropriate discussion
17 of the RAND royalty rate. And I'm going to exclude use of
18 7243 and the declaration that goes with it on the grounds
19 that under 403, I don't think the usefulness of it for the
20 point that Mr. Price mentions it for is clearly outweighed by
21 the confusion that it's going to generate among the jury and
22 the court as to practice in the industry. Those will be the
23 rulings of the court.

24 I warned you all yesterday that snowstorms were not
25 likely. We avoided the earthquake. We did not avoid an

1 accident on 405. And our juror who is coming on 405 is
2 missing-in-action. If she's not here by 9:15 and we haven't
3 found out where she is, then I'm going to start without her.
4 But we'll give her six more minutes, given that it was 405.
5 So we'll be in recess until we locate our missing-in-action
6 juror.

7 (The proceedings recessed.)

8 THE COURT: Please bring the jury in.

9 (The following occurred in the presence of the jury.)

10 THE COURT: Mr. Harrigan, are you ready to call your
11 first witness?

12 MR. HARRIGAN: Yes. We will call Mr. John DeVaan.

13 JON DEVAAN

14 Having been sworn under oath, testified as follows:

15 THE COURT: Counsel, you don't have any witnesses in
16 the courtroom, I trust? All right. Thank you.

17 THE CLERK: Will you state your name for the record
18 please?

19 THE WITNESS: John DeVaan.

20 MR. PRICE: We do have an expert in the courtroom.

21 THE COURT: Not without permission of the court. Had
22 we talked about that subject?

23 MR. PRICE: I'm sorry, I don't recall. We have
24 Professor Haedicke.

25 MR. HARRIGAN: We also have an expert, I just

1 realized.

2 THE COURT: All right. Since both sides are doing
3 it, we'll allow experts to stay.

4 Please proceed, Mr. Harrigan.

5 DIRECT EXAMINATION

6 BY MR. HARRIGAN:

7 Q Mr. DeVaan, by whom are you employed?

8 A Microsoft Corporation.

9 Q Please tell the jury what your current position is.

10 A I am the corporate vice president of development for
11 Windows.

12 Q And in that capacity what are your responsibilities?

13 A I work on designing and implementing and bringing to
14 market new versions of Windows.

15 Q How many people work for you?

16 A About 1,200.

17 Q Are those engineers, mainly?

18 A Those are all engineers. They're what we call the
19 software design engineers that write the program code for
20 Windows.

21 Q Okay. How long have you been with Microsoft?

22 A In a week it will be 29 years.

23 Q So let's talk about Windows. Basically you're in charge
24 of the design of Windows; is that it?

25 A Correct.

1 Q What is Microsoft Windows?

2 A Microsoft Windows is an operating system. And I think the
3 best way to explain that is to ask people to think about if
4 you've ever taken the lid off the computer, you see all those
5 parts in there, and that's the hardware. And then if you use
6 a program on your computer, say Word, or Firefox, or
7 something like that, Windows is the software in between
8 those.

9 And its primary purpose is to make it so the people
10 writing that application program, they don't need to know any
11 of the details about what brand of hard disk it is or what
12 kind of interface the hard disk has with the CPU or what the
13 RAM is or what the networking chip is. Windows, in computer
14 science terms, creates an abstraction that's consistent so
15 the application programmers can write their program once and
16 it works across many different kinds of computers no matter
17 which specific components are inside the computer.

18 Q How long has Microsoft been producing and marketing
19 Windows?

20 A Almost 30 years.

21 Q And take Windows 7, how many features did Microsoft add to
22 Windows 7?

23 A It's very difficult to say precisely, but it's thousands.
24 Thousands of features.

25 Q Okay. Are you familiar with a video coding technology

1 known as H.264?

2 A I am.

3 Q What's your understanding of what that is?

4 A H.264, think of it as the software. If you can imagine
5 the screen on the camera when the camera person is actually
6 looking at a scene, and then the screen of your computer.
7 And H.264 takes the source and compresses it down into a data
8 stream, whether that ends up on a hard disk or gets sent over
9 the internet, the idea is to make that data stream as tiny as
10 possible to be as efficient as it can be. Then it goes to
11 the destination. Then H.264 takes it apart and turns it into
12 the image that you see on the screen.

13 Q Is H.264 a so-called standard?

14 A Yes.

15 Q Who developed it?

16 A It was developed by the ITU.

17 Q Is it fairly or widely used, H.264, these days?

18 A Today it is. When we started designing Windows 7 it was
19 not.

20 Q Are there other ways to do this video compression besides
21 H.264?

22 A Yes. Thinking back to when we were designing Windows 7,
23 there were a variety of proprietary and competing standards
24 for video compression and playback.

25 Q Okay. Taking Windows as a whole, how large a portion of

1 Windows is the H.264 capability?

2 A The code for H.264 comes in two ways, actually. The part
3 of Windows which is the software version of it is a pretty
4 tiny part. When you think about Windows itself is a couple
5 gigabytes or more in size, H.264 may be a percent of that or
6 less. And then oftentimes the H.264 functionality will come
7 in a hardware chip that the computer maker chose to put
8 inside the computer.

9 Q If that happens, then what role does it play in Windows?

10 A We're just passing the data through to the chip.

11 Q Okay. How did Microsoft go about adding H.264 to Windows?

12 A So when we started, we were looking at the notion that
13 high-definition video is becoming more popular. So this is
14 back in, you know, 2006 even when we're looking at this. And
15 so we're trying to predict which of all these competing
16 technologies will be the one that will become popular or
17 popular enough that we should include it.

18 And our thinking at the time was taking H.264 as a
19 standard, we thought that its basis as a standard would mean
20 that its growth would accelerate. And today when you look
21 around, that's really quite true. There's still a lot of
22 flash video and a few other technologies, but the standard
23 H.264 grew. And I think our choosing to put it in Windows
24 helped it grow to that position.

25 But, you know, we're looking at these technologies on a

1 variety of bases. One is that it's a standard, which means
2 we're free to implement with expected terms on the
3 technology. And also its overall quality. Will it deliver a
4 good result for the end customer? And, of course, can we
5 make it and do it? And, again, because it's a standard it
6 makes it easier for us to complete the work.

7 Q Okay. Why is it easier because it's a standard?

8 A Well, it comes with all kinds of documentation, and even
9 sample code in this case, which makes it faster to do.

10 Q In terms of people and time, how long -- what were the
11 resources required?

12 A So we organize the work for a feature like this in a set
13 of engineers. So there's a developer that works for me.
14 There's a tester and a program manager, two other types of
15 engineers that we have. And so that team worked for a couple
16 months.

17 Q Does Windows include other technology that is defined in
18 other industry standards?

19 A Certainly.

20 Q How many industry standards are included in Windows,
21 roughly?

22 A Many hundreds if not thousands.

23 Q Of which H.264 is one?

24 A Correct.

25 Q So how does Microsoft approach the business decision to

1 incorporate a standardized technology in Windows? What are
2 the factors you consider?

3 A When we're looking at adopting a standard technology, we
4 do review the intellectual property basis of it and the
5 strength of the standards organization in setting up what
6 everyone here has come to know as RAND on the technology.
7 And that gives us the freedom to implement the technology and
8 feature without undue worry that something will happen later
9 that will cause us to have a problem.

10 Q What does RAND have to do with whether you have to have
11 undue worry?

12 A The notion -- it was discussed yesterday in legal terms --
13 but you create a product, this is the convention with the
14 standards body, because they get that -- what was it
15 called -- LOA, a Letter of Assurance, that people are free to
16 implement the standard understanding that any negotiations
17 around the terms of any possible patent will be done on a
18 reasonable manner and in a way that builds success for the
19 standard.

20 Q Okay. Why would you not use a standard without a RAND
21 commitment?

22 A It would be a recipe for potential trouble in the future
23 where some company could come from anywhere and demand a
24 large amount of money. And that would cause us to have to
25 change the product in the market, which is costly and

1 difficult and disappointing for our customers.

2 Q Are you familiar with the letter regarding the H.264
3 license that Motorola sent to Microsoft on October 29, 2010?

4 A I am.

5 Q Do you recall what the royalty percentage was that was
6 proposed in that letter?

7 A The court has reminded me plenty of times so far, 2.25
8 percent.

9 Q 2.25 percent of what?

10 A Of the end cost of a PC.

11 Q Not of Windows?

12 A Correct.

13 Q In your years at Microsoft have you ever encountered a
14 demand of that kind before?

15 A No.

16 Q Is there, in your view, an issue with the application of
17 the royalty percentage to the laptop or PC instead of to
18 Windows?

19 A It's impossible for us on a bunch of dimensions. For one
20 thing, the PC might have a price that would be more than the
21 price of Windows itself. And then the other is, we don't
22 really know what the revenues of the computer makers are.
23 That doesn't get reported to us. We'd have to invent a whole
24 mechanism to even begin to approximate what the number should
25 be.

1 Q In your experience of almost 30 years at Microsoft, have
2 you ever seen Microsoft threatened with an injunction by a
3 RAND patent holder simply because Windows included an
4 industry standard?

5 A No.

6 Q Would it have been feasible, in the fall of 2010, to
7 remove the H.264 feature from Windows?

8 A Feasible is an interesting word. There's the technical
9 feasibility of which it's possible. But I think for the
10 product definition it would be very difficult because we
11 promoted that aspect of the product. And pursuant with our
12 thinking when we were designing Windows 7, the playing of
13 high-definition video, in fact, became more popular and H.264
14 was a major share of it. So we'd be removing a feature which
15 was pretty broadly used. And that would hurt us with our
16 customers.

17 Q How about in January -- in the January to April timeframe
18 in 2012, a little over two years later, would it have been
19 any more feasible then?

20 A No. Worse.

21 Q Why?

22 A I think the notion that high-definition video is becoming
23 more and more popular with the larger penetration of
24 broadband networking, it would have had even more people
25 using it.

1 Q How about geography. Was it practical to make -- or would
2 it have been practical to make a special version of Windows
3 that would be shipped to only a specific geographic region?
4 In other words, one that didn't have H.264 in it, for
5 example, shipped to regions served by the German distribution
6 center?

7 A So there are a couple interesting parts to the question.
8 One is when Microsoft sells Windows directly, the technical
9 feasibility of it is not too difficult. We have all the
10 market things that I was talking about before of how good
11 would that product be versus competitors that we would have
12 to worry about.

13 But most people don't get Windows from Microsoft directly,
14 they get it on a new PC. And our partners, the HPs, the
15 Dells the Lenovos, they tend to make one computer model for
16 multiple countries. So it's not just imposing that on
17 Microsoft itself, it's also imposing that on our partners,
18 which would be a huge logistical challenge for them and also
19 raise costs, because the reason they do this is to get larger
20 runs on the assembly line, and so forth, to keep production
21 costs lower.

22 Q How about the customers served by the distribution center,
23 how would such a differentiation affect them?

24 A Talking about the distribution center in Germany, it would
25 have been impossible to serve all the other countries in

1 Europe, Middle East, and Africa. Those countries wouldn't be
2 strictly enjoined. We'd have to find an alternative
3 distribution mechanism and our partners would have to find
4 alternative distribution mechanisms, perhaps, for those
5 countries, where people have no reason they couldn't have
6 these features.

7 Q Okay. Could we take a look at the demonstrative -- did
8 you prepare a demonstrative of some varying computer
9 configurations?

10 A Yes.

11 Q So what are we looking at here? What are these different
12 computers?

13 A There are four different computers shown here. In the
14 upper left is the least expensive, a category of inexpensive
15 laptop known popularly as a netbook. Then on the upper right
16 is a laptop, which is a very typical laptop that people would
17 buy to use. And the lower left is a desktop PC. And on the
18 lower right is called a gamer PC. These are people who
19 really care about having the biggest screen with the highest
20 number of frames per second so that their games play very
21 quickly. Then it includes the prices for each of those.

22 Q Okay. Thanks.

23 So, with reference to the 2.25 percent we were talking
24 about, does Microsoft get any additional revenue when a PC
25 maker installs Windows in a more expensive computer?

1 A No. The computer maker has the choice of Windows and
2 Windows Pro. There's a higher price for Windows Pro. But
3 they could install Windows Pro or regular Windows on any of
4 these.

5 Q So whatever the price is of each version of Windows
6 doesn't change depending on the cost of the computer it goes
7 into?

8 A That's correct.

9 Q Was it practical in October of 2010 for Microsoft to pay
10 2.25 percent of the end-computer price for each worldwide
11 copy of Windows?

12 A No.

13 Q So suppose that Microsoft had agreed to pay 2.25 percent
14 of the worldwide PC sales -- Microsoft had agreed to pay
15 Motorola 2.25 percent of the worldwide PC sales in 2010.
16 What would that have been?

17 A In a total amount of dollars?

18 Q Um-hum.

19 A Well, we don't -- Microsoft doesn't know exactly. For
20 such a calculation to be precisely computed it would be hard
21 to get that exactly. So I have to rely on industry analyst
22 reports which vary a little bit. But using Gartner as one,
23 the estimated revenue is about 240, \$250 billion a year.
24 That's the revenue of computer makers selling PCs.

25 Q What does that tell you about what the royalty would have

1 been?

2 A Well, two percent would be \$5 billion of \$250. Windows
3 doesn't have a 100 percent share, so you could trim that by
4 ten percent or so and get around \$4.5 billion.

5 Q That would be the royalty?

6 A Right.

7 Q Has Microsoft ever agreed to pay patent royalties based on
8 the price charged by its customers for their products that
9 include Windows?

10 A No.

11 Q Let's talk about injunctions, which is an issue which
12 arose over a two-year period between 2010 and 2012. All
13 right. Do you have an understanding of the practical impact
14 that Microsoft would experience if it faced a potential
15 injunction against ongoing sales of Windows in any particular
16 market? What would be the effect?

17 A So the effect would -- first for the companies that make
18 computers -- would create a large number of logistical
19 problems. As I was talking about before, as they have to
20 scramble to perhaps create new distribution, they have to
21 create new SKUs for production in their production
22 facilities. And that would be quite an undertaking.

23 Q How would such an injunction potentially impact Microsoft
24 in relationship to its competitors?

25 A I think you have to answer that as a person walking into a

1 store, and there's a table -- you can walk into Best Buy here
2 -- and there's a table with PCs on it, a table with
3 Macintoshes on it, and iPads and Android devices. And what
4 are people going to think when they come in, which device do
5 they want? I mentioned earlier that playing high-definition
6 video is something that's just becoming more popular. And if
7 there was any concern that they wouldn't be able to go to a
8 YouTube or Vimeo and the video might not work, I think people
9 would hesitate to choose Windows.

10 Q In other words, if Microsoft dealt with the injunction by
11 taking H.264 out, that's the situation that would arise?

12 A Correct.

13 Q Okay. What would be the impact of an injunction if
14 Microsoft were enjoined from shipping Windows in any
15 particular market because it included the H.264 standard?
16 And you might want to separately describe what happens with
17 the manufacturers of the PCs and the consumer.

18 A So if --

19 MR. PRICE: Your Honor, I'll object. It's vague,
20 compound and asks for a narrative, as well as expert
21 testimony, I believe.

22 THE COURT: Overruled.

23 A So, I think for Microsoft, doing the technology work for
24 it would not be too difficult. It does create complexity for
25 us. We have to manage that very precisely. And it's hard to

1 understand what the rules would be about people taking PCs
2 between countries and stuff like that; that would have to be
3 figured out.

4 I mentioned before that it's traditional in many parts of
5 the world -- we're unique in the United States, we don't have
6 to deal with this very much -- but the computer manufacturers
7 create a model, and when you start it up you pick a language,
8 and that's the language you have when you're done with it.
9 But it's a model that serves many countries and many
10 different languages.

11 So if it was required to ship something different in a
12 specific geography, that would essentially double the number
13 of computer models that the manufacturer would have to make.
14 And it would impact the run rates in the factory and that
15 would make PCs more expensive.

16 If the country with the injunction happened to be a
17 distribution center, then presumably that country couldn't
18 distribute with that technology in it to other countries.
19 And so that would mean having to move distribution out of
20 that country or allow the product to be less competitive in
21 countries where it doesn't strictly need to be.

22 Q Okay. Has Windows actually lost any sales or profits
23 because of any actions by Motorola?

24 MR. PRICE: Objection. Lack of foundation.

25 THE COURT: Sustained.

1 Q You're aware that efforts were made to obtain injunctions
2 in various forums, the ITC, the state of Wisconsin, and
3 Germany. Did any of those attempts, to your knowledge,
4 result in lost sales or profits of Windows?

5 MR. PRICE: Same objection.

6 THE COURT: I'll permit that question.

7 A I think it's very difficult to quantify the impact of the
8 uncertainty created in people that pay attention to the
9 industry. So measurably I'd have to say no.

10 Q Then why is Microsoft worried about Motorola and its H.264
11 patent portfolio?

12 MR. PRICE: Objection. Lack of foundation.

13 THE COURT: Sustained.

14 MR. HARRIGAN: No further questions.

15 THE COURT: Mr. Price.

16 CROSS EXAMINATION

17 BY MR. PRICE:

18 Q Good morning, Mr. DeVaan. Let me ask you, do you have a
19 -- I'm told you have a kit like a notebook up there. Oh,
20 it's arriving.

21 THE COURT: Mr. Price, does Microsoft have a copy
22 also?

23 Q First I want to ask you about those letters that you
24 talked about, the letters in October of 2010. And first, as
25 of May of this year, May of 2013, you had never seen those

1 letters, right?

2 A I had not seen them at the point in time. But I had seen
3 them later as presented to me as part of this matter.

4 Q Sure. So in other words, between October 2010 and around
5 May of 2013, during that timeframe you had not seen the
6 letters, but in connection with litigation you saw the
7 letters for the first time?

8 A That's correct.

9 Q And so you're aware that at least as early as October 22,
10 2010 there were actually discussions between Motorola and
11 Microsoft about patent issues, correct?

12 A I am not aware. I was not, at the time, aware of any
13 discussions going on, because it's not my area of
14 responsibility.

15 Q Okay. Well, you used the number \$4.5 billion. It's
16 correct that you're not aware of that number in those
17 negotiations ever being mentioned, that is, Motorola ever
18 saying we want \$4.5 billion dollars from Microsoft, correct?

19 A I was not part of the negotiations, so I'd have no way to
20 know.

21 Q And you talked about the number of topics concerning why
22 it would be unfair and inappropriate to apply a 2.25 percent
23 rate to the Windows operating system. Do you recall that?

24 A Yes.

25 Q You think those are pretty compelling arguments?

1 A I think those are compelling arguments when you think
2 about Microsoft's business model on Windows and the business
3 model of our partners.

4 Q Now, do you know whether or not those arguments were
5 presented in the negotiations between Microsoft and Motorola?

6 A I do not.

7 Q Certainly you would expect them to be?

8 A I don't know what to say. It's not my area.

9 Q Okay. So just to be clear, then, you don't really have
10 any knowledge as to, you know, what was actually discussed
11 substantively between Microsoft and Motorola, beginning
12 October 22, 2010, about what kind of money should flow from
13 one company to another with respect to these various patents;
14 is that accurate?

15 A I was not party to any negotiations about it.

16 Q Okay. Well, let me ask you. You did talk about kind of
17 the scope of the Windows operating system and kind of sales
18 relating to that. So let me ask you, in the 2009/2010
19 timeframe, is it correct that Microsoft's share of operating
20 systems for personal computers was somewhere over 90 percent?

21 A That's correct.

22 Q And Microsoft also had operating systems for mobile
23 phones, right?

24 A That's correct.

25 Q By 2010, because mobile phones were becoming fairly

1 important as operating systems or as sources for operating
2 systems, Microsoft considered as competitors in the mobile
3 system area Android and Apple's IOS, right?

4 A That's correct.

5 THE COURT: Mr. Price, you might explain what an IOS
6 is.

7 MR. PRICE: Thank you.

8 Q What is the Apple IOS?

9 A So when you get devices they come with operating systems.
10 So when you buy a Windows device you get Windows. If you buy
11 an iPad or an iPhone you get IOS. If you buy Android phone
12 you get the Android operating system.

13 Q If you look at -- well, also some time around 2008, 2009,
14 2010, people began thinking of the market for operating
15 systems as including both PCs for desktops and also phones,
16 and then later tablets, right?

17 A I'm going to take a minute to think about the timeframe
18 that you mentioned. So, 2008 is probably a little early.
19 But not too long after that I'd say it was an emerging thing
20 where we did start thinking about it in that way.

21 Q And in 2007 Apple had come out with this kind of cool
22 operating system that was touch sensitive?

23 A Well, the device, yes, the iPhone.

24 Q They didn't invent the actual technology but they were
25 first to market with that feature?

1 A Yeah. I don't think so. But they made it popular.

2 Q Okay. That's fair enough. Certainly Microsoft's
3 operating system did not provide that feature at that time?

4 A For a particular kind of touch, that's true.

5 Q What particular kind of touch are you talking about?

6 A It's called capacitive touch.

7 Q So can you --

8 A There were touch screens before the iPhone. And they used
9 the technology called resistive, which was just not as
10 responsive to your finger as capacitive touch was.

11 Q Resistive uses like the little stylus, or something that
12 you push?

13 A Or press very hard, yeah.

14 Q So it's true that if you looked at the entire spectrum
15 then of this market as of -- let's say as of today. If you
16 look at the entire spectrum of personal computers and laptops
17 or tablets and phones, that instead of being over 90 percent
18 of the market, Microsoft has more like a 30 percent market
19 share?

20 A I haven't seen a specific report where I could answer to
21 the 30. But much less than 90 I could say.

22 Q Well, your best -- let's say your rough, swag scientific
23 estimate is about 30 percent, right?

24 A That is true.

25 Q Okay. And, in fact, Microsoft began losing share in the

1 phone operating system market until it came out with its own
2 capacitive touch interface, which was Windows Phone 7, right?

3 A In which timeframes are you talking?

4 Q I'm talking about until -- after Apple came out with its
5 capacitive touch phone and up until Microsoft came out with
6 its own, its Windows Phone 7, the 2010 Windows phone, from
7 that timeframe Microsoft was losing market share because it
8 wasn't keeping up with its competitor?

9 A Well, we were losing market share.

10 Q And you thought it was because it wasn't providing an
11 operating system that had this feature, this capacitive
12 touch? That was one of the main reasons?

13 A I'll --

14 MR. HARRIGAN: Objection, lack of foundation.

15 THE COURT: I'll overrule the objection.

16 A I think there were a lot of factors and that was certainly
17 one of them.

18 Q Was Microsoft paid for use of its IOS system on phones?

19 A We don't market IOS.

20 Q I'm sorry. Yeah, thanks. Microsoft was paid for its
21 operating system on phones?

22 A Yes.

23 Q Okay. At least until it came out with its Windows Phone 7
24 it was losing market share in connection with that product,
25 between the time Apple came out with its IOS systems and when

1 Windows Phone 7 came out?

2 A Yes.

3 Q And there was a big unveiling around October 11, 2010, of
4 this Windows Phone 7 that Microsoft was going to try to use
5 to regain the market share?

6 A I saw that in the exhibits yesterday during the opening
7 presentations. I don't remember exactly when we launched
8 Windows Phone 7.

9 Q Well, do you have a rough scientific-sweg guess?

10 A I'll accept what was presented yesterday. That's fine.

11 Q So you were here during the opening statements?

12 A Yes.

13 Q Well, let me ask you this. Do you have some recollection
14 that that unveiling was done just about ten days after
15 Microsoft filed its lawsuit against Motorola?

16 A I couldn't speak to specifics about the timing on it.
17 Really, I couldn't. I saw it was presented yesterday.

18 Q That's fair enough.

19 So you also talked a little bit about injunctions and
20 royalty rates and how that would affect Microsoft's business,
21 correct?

22 A I did.

23 Q Did you have any understanding at any timeframe after 2010
24 that a company, any company, could get Microsoft to pay it
25 any royalty if Microsoft refused, without the assistance of a

1 court?

2 MR. HARRIGAN: Objection for lack of foundation.

3 THE COURT: I didn't understand the question, so I'll
4 sustain that one.

5 MR. PRICE: Let me see if I can make it
6 understandable.

7 Q You understand that in this lawsuit there have been
8 discussions about royalty rates, correct?

9 A In this lawsuit or the prior lawsuit?

10 Q Let's say -- well, let me be clear. Let's make it
11 broader.

12 You understand that Microsoft is often approached by
13 people, companies that have patents, that say we would like
14 you to pay a certain rate?

15 A Microsoft is approached by companies that ask for
16 royalties, that's true.

17 Q Okay. Do you have any understanding that any of those
18 companies are able to force Microsoft to pay a royalty
19 without first going to a court and asking that there be some
20 determination that that's appropriate?

21 MR. HARRIGAN: Lack of foundation.

22 THE COURT: Overruled.

23 A As a person that doesn't engage in the negotiations, I
24 don't know what to say to that question. I think before, I
25 said we've never paid a royalty like Motorola was asking at

1 the time.

2 Q And so if you don't know the answer, that's fine. But you
3 don't know whether or not a company like Motorola is able to
4 somehow force Microsoft to pay a specific royalty without
5 going to court and getting a determination as to whether or
6 not that's fair?

7 A I don't know. I don't engage in that part of the business
8 directly so I couldn't tell you.

9 Q Okay. So licensing is not your thing?

10 A The negotiations of licensing, correct.

11 Q Okay.

12 MR. PRICE: No further questions, Your Honor.

13 THE COURT: Redirect?

14 MR. HARRIGAN: No questions, Your Honor.

15 THE COURT: All right. You may step down.

16 Next witness please, counsel.

17 MR. CEDEROTH: Microsoft calls David Treadwell.

18 DAVID TREADWELL

19 Having been sworn under oath, testified as follows:

20 THE CLERK: Will you state your name for the record,
21 please.

22 THE WITNESS: David Treadwell.

23 THE COURT: You may proceed, counsel.

24 DIRECT EXAMINATION

25 BY MR. CEDEROTH:

1 Q Mr. Treadwell, by whom are you employed?

2 A Microsoft.

3 Q What's your current position?

4 A I'm the corporate vice president for the Xbox software and
5 services engineering team. That means I'm responsible for
6 the development, the testing, the operations, of all of our
7 Xbox software and services development, people that write the
8 code, testing, in other words, the people that confirm the
9 code does what it is supposed to do, and the operations
10 confirm or operate the service to make sure that it's up and
11 doing what it's supposed to be doing.

12 Q And in your position are you part of a senior leadership
13 team for the Xbox group?

14 A Yes, I am. There's about eight of us who are on the Xbox
15 leadership team.

16 Q And how many people report to you today?

17 A About 1,500.

18 Q Mr. Treadwell, how long have you been with Microsoft?

19 A 24 years.

20 Q Now, have you prepared a chart that might help us
21 understand just briefly what Xbox is?

22 A Have I prepared a chart?

23 Q An image of Xbox?

24 A You want me to describe what the Xbox --

25 Q I wonder if we could put up PDX4. And the question I have

1 for you is not so much what's shown on the screen, but rather
2 could you describe briefly to the jury what is the Xbox? I'm
3 not sure if everyone here has spent as much time running a
4 game machine as maybe you have.

5 A Yes. Fair enough. Yes, I do spend a little time with
6 this, as do my kids. So an Xbox -- originally Xbox was
7 designed as a gaming console. So what that means is it's a
8 device that attaches to your television, and the purpose of
9 it is to play games.

10 Over time we've extended from the gaming core, which is
11 what most people do with Xbox, to add various video and music
12 services. So in addition to gaming, which is still the thing
13 people use it for primarily, you can also do things like
14 watch Hulu or Netflix or YouTube on an Xbox.

15 Q How long has Microsoft been producing and marketing the
16 Xbox platform?

17 A The Xbox project started in 1999. The original Xbox
18 started selling in 2001. So we have been selling it for
19 about 12 years now.

20 Q Let's talk a little bit about the standards that are at
21 issue in this case. Are you familiar with a video coding
22 technology known as H.264?

23 A Yes, I am.

24 Q Just at a general level, what's your understanding of that
25 technology?

1 A Sure. So the concept of a codec is that it takes the data
2 that is involved in something like a video -- and there's a
3 whole lot of data involved in a video. Each point on the
4 screen, we call that a pixel. There's a huge amount of data
5 involved in transmitting a video. So the purpose of a
6 codec -- compression decompression, it's a short word for
7 compression decompression -- the purpose of a codec is to
8 take that giant amount of data that is involved in a video
9 and compress it down to something very small, so it can be
10 successfully transmitted over the internet or stored on an
11 optical disk.

12 Then the decompression phase is on the device where it
13 takes that compressed form of the data and it blows it back
14 up to the full size so it can send it out to a television.

15 Q Is that a standard?

16 A Yes. H.264 is a specific standard form of codec. There
17 are many other codecs in the industry. But H.264 is
18 basically the premier industry standard of codecs at this
19 point in time.

20 Q Does Xbox include H.264 capabilities?

21 A Yes, we do. We need H.264 to work with many of the video
22 services I described, like YouTube.

23 Q Now, how did Microsoft come to build and add this H.264
24 functionality to the Xbox?

25 A What happened is that the Windows organization created an

1 implementation of H.264. And then several years ago when we
2 started to incorporate these video services in Xbox, we
3 imported that implementation from the Windows team to the
4 Xbox platform.

5 Q Now the other standard that's at issue in this case is
6 802.11, sometimes called WiFi. Are you familiar with that
7 technology?

8 A Yes, I am.

9 Q Again, at a general level, could you explain your
10 understanding of what that technology is?

11 A Sure. So the purpose of WiFi is to allow a device to
12 connect to a network without requiring a wire. Historically
13 there was -- there are cables such as an Ethernet cable, and
14 you actually have to plug a device into the network to get it
15 to talk on the network.

16 WiFi is the very common standard that all of us use today
17 to connect our devices to the internet, such as pretty much
18 any device in your home that's talking, whether it's your
19 laptop or iPad or Android device or Windows machine. If it's
20 not connected by a wire, it's talking on the internet by
21 virtue of WiFi.

22 Q And does Xbox include 802.11 with WiFi capabilities?

23 A Yes, it does.

24 Q How did Microsoft come to build and add this standardized
25 technology into the Xbox?

1 A Sure. So, many years ago we recognized the importance of
2 WiFi to the console. Many people don't have a physical
3 network connection near where their TV is, and they need that
4 in order to connect on the network. So we built the WiFi
5 technology into the Xbox so if a customer wants to use the
6 internet services, either online gaming or video services, so
7 they can get at those services without having to rewire their
8 house to have a physical wire.

9 Q And did you rely on the standard? Or what role did that
10 play in terms of creating the technology that was used?

11 A Absolutely. The existence of that standard is super
12 important. When you buy a WiFi router, it has that standard
13 embedded in it. And it was very important to us that we
14 worked with a standard so that we wouldn't require somebody
15 to get a different WiFi router than they already have in
16 their house. That's a very difficult thing for people. So
17 we very much relied on the existence of that standard to
18 incorporate WiFi into that Xbox.

19 Q Does the Xbox include other technology that is defined in
20 the industry standards?

21 A Yes. We have dozens if not hundreds of standards we rely
22 on in the Xbox.

23 Q When it comes to your level, introducing the engineering,
24 creating the engineering in adding one of those standards to
25 the Xbox, how does Microsoft approach the business decision

1 of whether to include that technology?

2 A Sure. So the business decision is we weigh two high-level
3 factors: The benefit of the technology and the costs to us
4 to incorporate the technology. So we look at the customer
5 benefits. How much do people want something like WiFi in
6 order to connect their machines to the internet? And then we
7 look at the costs? There are many dimensions of costs.
8 There's the engineering costs that we incur to build the
9 hardware into the Xbox, to design the software to make use of
10 that. And there are also the physical costs. Including that
11 hardware in the Xbox console costs us money. Then we look at
12 the licensing costs. How much is it going to cost us to
13 license any intellectual property that we need to include
14 that technology.

15 Q There's been quite a bit of discussion about RAND
16 commitments so far. What role, if any, do RAND commitments
17 in relation to an industry standard play in the Xbox decision
18 as to whether to include that industry standard in the Xbox?

19 A The existence of RAND commitments are a foundational part
20 of our decision to include standards in the Xbox. We need to
21 know that we can depend on including that technology for the
22 benefit of customers at a reasonable price to us.

23 Q Does the approach for Xbox in terms of incorporating new
24 technology differ for technology that does not include a RAND
25 commitment?

1 A Yes. Technologies that don't have a RAND commitment, more
2 typically we can work around those technologies. We don't
3 necessarily need to have them for our standard. For a
4 standard, however, in order to incorporate that standard,
5 it's typically the case that the intellectual property that
6 there might be a RAND license for, we cannot implement that
7 standard without having access to that intellectual property.

8 Q At some level over the last several years have you become
9 aware of the letters that Motorola sent to Microsoft in
10 October 2010 concerning 802.11 and H.264?

11 A Yes, I'm aware of them.

12 Q Now, in all your years at Xbox or Microsoft, have you
13 encountered a demand like this before?

14 A I have never encountered a demand like this one on
15 standards-essential patents.

16 Q I'm going to go back to the technology in terms of 802.11
17 that goes into the Xbox. Is there hardware involved in that?

18 A Yes, there is. There is a chip that is actually included
19 in the Xbox. It's the thing that talks, the radiowaves that
20 are the basis of WiFi.

21 Q How much does Microsoft pay for that chip? I assume they
22 buy it?

23 A Correct. We buy that from a subcontractor Marvell. It's
24 a commodity chip so price has been driven down pretty well.
25 It costs us about \$3 for that chip.

1 Q I'd like to talk a little bit about packages and how
2 Microsoft sells the Xbox and packages it for sale. Have you
3 prepared a chart that has some samples of those packages?

4 A Sure.

5 Q Mr. Treadwell, in relation to this chart, can you briefly
6 describe a couple of examples in terms of what goes into a
7 bundle that Microsoft sells of Xbox products and how it
8 affects the price?

9 A Sure. So what we have here is several of the Xbox bundles
10 that we sold last holiday season, last Christmas. For
11 example, in the upper left we have the 360, 4 gigabyte Kinect
12 bundle. So what that was, was the basic console with 4
13 gigabytes of storage, including the new Kinect sensor. And
14 we sold that for \$249. In the upper middle there's another
15 package that has the same Kinect and same Xbox, except it has
16 250 gigabytes of storage. So the primary difference between
17 those is the additional storage space. And because of that
18 additional storage space we sell it for \$100 more.

19 If you look at the lower left, the 360 limited edition
20 Halo 4 console. That's another 250 gigabyte console. But
21 what it has is the decorations on the box and on the game
22 controllers for Halo 4. It's basically just some fun
23 decoration on the outside. The innards of that are all the
24 same. It does not include Kinect but it does have an
25 additional control, it has a second controller.

1 Then the bottom middle is the Star Wars console. That is
2 another 250 gigabyte with Kinect console. It includes the
3 Star Wars game. And it has some Star Wars packaging that
4 looks like -- the console looks like R2-D2, the controller
5 looks like C-3PO. When you start the console, it makes an
6 R2-D2 sound. And that one sells for about \$400.

7 Q Now, with respect to the WiFi capabilities and the H.264
8 capabilities, do they differ over the various packages and
9 bundles you show there?

10 A No. The WiFi capabilities in all of the consoles shown
11 here are absolutely identical. It's the same hardware. It's
12 the same software. There's no difference in the WiFi
13 capabilities in these bundles.

14 Q In your description of some of these bundles you mention a
15 product called Kinect. Please tell us briefly what that
16 product is.

17 A Sure. So Kinect is a sensor, we call it. What it does is
18 it senses people's movements and your voice. So it's really
19 a cool new device. It enables new scenarios. Like instead
20 of physically holding a controller to tell the Xbox what to
21 do, you can gesture at it. You can wave your hand and it
22 will see what you're doing. You can do a dance game and it
23 will see how well you're dancing in front of it. It also
24 recognizes your voice so you can give the Xbox commands. If
25 you're laying on your couch and you want to watch the next

1 episode of a show on Netflix, you can say, "Xbox, next
2 episode." And it will skip to the next episode. So you
3 don't even have to move your arms to get to the next episode.

4 Q A slightly more serious topic, then. There's been some
5 discussion about injunctions that Motorola has sought in
6 various jurisdictions. Are you familiar with those from your
7 role on the Xbox solutions team?

8 A Yes, I am.

9 Q Now, have you ever seen Microsoft or Xbox threatened with
10 an injunction by a RAND patent holder previously solely
11 because Xbox used an industry standard?

12 A This is the only time I've ever seen a threat on a
13 standards-essential patent with a RAND commitment on it.

14 Q Well, would it have been feasible for you and Xbox to
15 remove the H.264 or the 802.11 support from Xbox in the fall
16 of 2010?

17 A Technically we could have removed those standards. We
18 could have shipped a product that didn't have 802.11. We
19 could have shipped a product that didn't have H.264.
20 However, it wouldn't have been a viable product. So many
21 people -- a large percentage of our customers access the
22 internet by WiFi. A large percentage of our customers watch
23 videos on their Xbox by H.264. So it wouldn't have been a
24 commercially-viable product to ship without 802.11 or without
25 H.264.

1 Q Let's take a step forward in time to early 2012. Did the
2 situation change as of then or what would the considerations
3 be then?

4 A In 2012, if anything, that functionality would be more
5 important. More people are getting on the internet by WiFi.
6 More people are using videos on the Xbox with H.264. So in
7 2012 it's even more critical that we have that foundational
8 functionality.

9 Q How about today?

10 A Even more critical today. These pieces of functionality,
11 people embrace them and they demand them ever more.

12 Q Over that timeframe, 2010 through today, was it practical
13 for Xbox to create a special version to ship only to a
14 specific geographic region such as Germany?

15 A The same factors apply. Technically it would have been
16 practical to ship a version without H.264 or 802.11.
17 Business-wise it would have been devastating in that market
18 if we had to create a version that didn't have that base
19 functionality.

20 Q How would a specialized version like that affect, if at
21 all, your relationship with the game makers that actually
22 make the Xbox games?

23 A One of the things that's very important to us in Xbox is
24 the whole ecosystem of gaming. We work very hard to appeal
25 to game developers, other companies who create games that run

1 on our system. What those people want to know is that they
2 can sell lots of copies of their games. So if we had not
3 been able to sell Xbox as a viable product in markets, what
4 would have happened is it would have been significantly
5 damaging to our entire ecosystem companies. Like Electronic
6 Arts, which ships the FIFA soccer game. Super popular in
7 Europe and in Germany. Had we not been able to ship Xbox in
8 Germany, a company like Electronic Arts would have been much
9 less interested in making FIFA great on our platform. And
10 they would have, therefore, spent more time making FIFA great
11 on our competitors' platform. And thereby advantage those
12 competitors in other markets even beyond the market in which
13 we were impacted.

14 Q Going back to the October 2010 letters, briefly. You
15 understand that Motorola had sought 2.25 percent for the
16 802.11, 2.25 percent for H.264. Do you have an understanding
17 as to how much that would have been for 2010 in terms of
18 royalties?

19 A Yeah. The all-up costs would have been on the order of
20 around a hundred million dollars across the Xbox business.

21 Q In today's world and competition, does Microsoft Xbox face
22 competition solely from the traditional game makers such as
23 Sony and Nintendo?

24 A No. Sony and Nintendo, they also sell game consoles and
25 they are most direct competitors. But what's happening more

1 and more in the world is people are playing games on other
2 devices even beyond game consoles. So what we see is -- we
3 call it disruption -- where other kinds of devices are
4 starting to disrupt what's going on in game consoles.
5 Specifically two devices making a lot of traction here are
6 the IOS, the iPad and iPhone devices from Apple. And Android
7 devices are also making a lot of traction in terms of getting
8 customers' energy on gaming.

9 Q Let me ask you. There's a new version of Xbox coming to
10 stores soon, as I understand it?

11 A Yes, there is.

12 Q And what role did industry standards having RAND
13 commitments such as H.264 and 802.11 play in that product?

14 A With the Xbox One, the new product we have coming out this
15 holiday, it basically plays the same exact role. We included
16 WiFi and included H.264 in that product on the assumption
17 that we could include those technologies for reasonable
18 license fees.

19 MR. CEDEROTH: Thank you. Pass the witness, Your
20 Honor.

21 THE COURT: Mr. Price, we're going to go until about
22 10:35 and then take our morning break.

23 MR. PRICE: I'll try to finish by then, Your Honor.

24 CROSS EXAMINATION

25 BY MR. PRICE:

1 Q Good morning, Mr. Treadwell. Now one of the questions you
2 were asked was whether or not you had ever encountered a
3 "demand" like the October 2010 letters. Do you recall that?

4 A Yes I do.

5 Q And I think you testified you were on some sort of a
6 council with respect to the Xbox.

7 A Right. We call it the Xbox leadership team. It's a group
8 of about eight executives that kind of make the fundamental
9 decisions what we do with Xbox.

10 Q When you're on that leadership team are important things
11 that are impacting the Xbox communicated to you?

12 A Yes, absolutely.

13 Q And you said you hadn't encountered a demand like these
14 letters before. When is the first time you encountered the
15 letters?

16 A I don't recall the specific time, I'm afraid.

17 Q It wasn't until very recently that you even knew about the
18 letters, right?

19 A No. I believe we discussed in the Xbox leadership team
20 the letters -- I don't want to guess exactly when it was, but
21 it was a while ago that we actually talked about those.

22 Q Well, was it in October 2010 that the leadership team all
23 of a sudden hear about some letters from Motorola concerning
24 the Xbox?

25 A Honestly, I don't remember when we first started talking

1 about the letters. With the leadership team it was an
2 ongoing topic of conversation and decision-making that there
3 was this threat of a lawsuit and an injunction. But I don't
4 recall the exact dates when we first started talking about
5 it.

6 Q So you said there was a discussion about a threat of a
7 lawsuit. So are you saying you heard about these letters
8 prior to November 10, 2010?

9 A I don't recall when we first started talking about the
10 letters. I don't remember when that was. It was an ongoing
11 topic of conversation for several years. I'd have to go look
12 at my records and figure out when it was.

13 Q Is it your belief that these letters, just on their face,
14 were of such importance that they would have been brought to
15 the leadership council?

16 A What was important is the overall framework of what was
17 going on with these legal matters and how that might impact
18 our business. The focus of our discussions in the leadership
19 team was the potential threats we had for things like an
20 injunction and how that might affect our business.

21 Q My question was a little bit different. And that is,
22 looking at these letters just on their face, was that
23 something that you think was of such importance that it would
24 have been, if it was of such importance, brought to the
25 leadership council?

1 A The letters themselves didn't play a significant role with
2 the leadership team. What played a significant role was the
3 proceedings and what was going on and the threats to our
4 business.

5 Q Okay. So you're saying that what played a significant
6 role would be actual lawsuits, for example?

7 A Lawsuits and how the legal staff advises us on how to
8 handle those lawsuits.

9 Q Okay. So if you look at the letters themselves, you saw
10 they had some references to grant-backs. Do you remember
11 that?

12 A I remember that from seeing that yesterday, sir. That's
13 my only recollection of it.

14 Q Is that something that you remembered recently or that you
15 have known for a while?

16 A I only saw the letters or read that part of the letters
17 yesterday.

18 Q Okay. So that part of the letters you only read
19 yesterday. How about the part of the letters that talked
20 about the possibility of licensing just a portion of the
21 patents?

22 A This wasn't a topic of conversation amongst us in the Xbox
23 leadership team.

24 Q And you now understand that right after, like that
25 October 21st letter was sent, that there were, in fact,

1 discussions among the parties, correct?

2 A I understand that to be true, yes.

3 Q And were you involved in those discussions among the
4 parties as to what the companies were actually looking for in
5 connection with their respective patents?

6 A No, I was not involved in that.

7 Q Now, in connection with discussing possible impacts of
8 things like injunctions, did you in those discussions have
9 any discussions about whether an injunction could issue
10 without the approval of the court saying that that's
11 reasonable?

12 A Yes, we did have many discussions about the possibility of
13 an injunction and what that might mean for us as a business.

14 Q And I understand you might have had discussions about what
15 an injunction might mean as a business, but did you have some
16 understanding that Motorola, without getting a court
17 involved, could somehow stop Microsoft from selling Xbox?

18 A I'm sorry, I don't understand your question.

19 Q Did you talk about -- was there some possibility that
20 Motorola, without getting the court involved, could somehow
21 stop Microsoft from selling Xboxes?

22 A Well, we had discussions about how Motorola might involve
23 government entities to prevent things like the importation of
24 Xbox into various countries. And there was high-level
25 discussion about the legal matters around that. What we

1 focused on in the business teams was what we might do about
2 those injunctions, both in our products and in our business.

3 Q So what you talked about was that Motorola couldn't just
4 stop Microsoft from selling Xboxes; it would have to get some
5 sort of approval from a government entity or from a court,
6 right?

7 A That's correct. We knew that Motorola would have to have
8 some government-sponsored entity that would be the thing that
9 actually enjoins us from shipping Xbox or from selling Xbox.

10 Q So there would have to be some finding by some entity that
11 that was a reasonable and appropriate thing to do. Motorola
12 couldn't do it on its own?

13 A Yes, that's correct.

14 Q And now getting on to the grant-back question. Microsoft
15 itself had essential patents on these standards, right?

16 A That's my understanding, yes.

17 Q And so -- you understand essential patents are patents
18 where you can say, you know, you may not be able to make your
19 product without using my technology, correct?

20 A That's correct.

21 Q And so Microsoft had patents itself on technologies that
22 Motorola was using in its products?

23 A Yes. That's correct.

24 Q In fact, it had standards-essential patents that Microsoft
25 thought Motorola was using the technology in those patents?

1 A Yeah.

2 Q And so Microsoft, absent the RAND obligation, could have
3 said, we don't want you to produce those. We can stop you
4 from producing them?

5 A Well, absent a RAND obligation, those patents wouldn't
6 have been required for the standard, because we wouldn't have
7 -- the standard-setting bodies would not have let us
8 incorporate that intellectual property into the standards
9 without a RAND commitment on our part.

10 Q Let me ask you this. In the conversations between the
11 companies that took place after October 21, 2010, did the
12 parties talk about how they both had essential patents and
13 they had to come somehow to some kind of resolution, an
14 overall resolution?

15 A I don't know. I was not involved in that.

16 Q And you did some multiplication as to what 2.25 percent
17 would mean to Xbox sales. Are you aware of conversations
18 between the parties after October 22nd or after October 21st,
19 2010, where that amount was demanded by Motorola?

20 A I'm aware of those conversations. I had no involvement in
21 them and I'm not able to speak to what happened in them.

22 Q And let me ask you what I think is probably one final
23 topic. That is, if we look at PDX004 which is the Star Wars
24 and everything.

25 A Um-hum.

1 Q First of all, there's a controller there, do you see that?

2 A Yes.

3 Q That controller has to communicate with the Xbox, right?

4 A Correct.

5 Q And there's technology involved in that communication that
6 goes beyond the standards essential WiFi technology, correct?

7 A Yes.

8 Q And one of the things Motorola contended in these
9 conversations was it had a non-standards essential patent
10 that read on those communications; that is how the controller
11 works with the Xbox?

12 THE COURT: Mr. Price, you've said the magic word
13 "read on." Will you explain to the jury what that term
14 means?

15 Q Let me make those magic words into un-magic words. That
16 Motorola contended that it had patents which covered the
17 technology that Microsoft was using in its controller to
18 communicate with the Xbox. And that is that, in other words,
19 that Microsoft was infringing that patent, correct?

20 A Yes, that's correct. There is an important difference,
21 however. With the WiFi patents, for example, we could not
22 implement the WiFi standards without reading on Motorola's
23 patents onto those standards. They're essential to the
24 standard. The fundamental difference with the controller
25 patents is we had the ability to work around those patents

1 and still deliver the product. So we could have had
2 engineering solutions that do not depend on those patents,
3 which is different from WiFi, where we could not ship WiFi
4 without a license to those patents.

5 Q Let me ask you about that. You just said that Microsoft
6 couldn't change its products so that it wouldn't read on
7 Motorola's patents. When is the first time Microsoft
8 admitted that Motorola's patents were standards essential and
9 that they were breaching them?

10 A I don't know the answer to that question.

11 Q Isn't that kind of essential to the answer you just gave?
12 You just said that Microsoft was using Motorola's patents
13 which were standards essential. When did you first come to
14 that conclusion?

15 A I don't recall when we came to that conclusion.

16 Q Last year?

17 A Internally in the businesses, it was probably early 2012.
18 I don't recall the exact timing of that, though.

19 Q Your understanding, though, that as of 2010 when these
20 negotiations were taking place, that Microsoft's position was
21 that Motorola's patents were not standards essential and that
22 they weren't valid patents and that Microsoft didn't owe a
23 penny on them?

24 A I wasn't involved in that. That could be.

25 MR. PRICE: I'm finished, Your Honor. Thank you.

1 THE COURT: All right. Ladies and gentlemen we're
2 going to take our morning break. Let's take it ten minutes
3 long, so that you'll all be back in at ten minutes to eleven.
4 We'll shorten it up a bit and see if we can't make up some
5 time.

6 (The following occurred outside the presence of the jury.)

7 THE COURT: We'll be in recess for ten minutes.

8 (The court recessed.)

9
10 THE COURT: Mr. Cederoth, are you going to have
11 redirect?

12 MR. CEDEROTH: Very briefly, your Honor.

13 THE COURT: Please be seated. Bring the jury in.
14 (At this time the jury entered the courtroom.)

15 THE COURT: Mr. Cederoth.

16 MR. CEDEROTH: Thank you, your Honor.

17 REDIRECT EXAMINATION

18 By Mr. Cederoth:

19 Q I want to clarify one thing after Mr. Price's questions.
20 Specifically, he asked you about timing and participation on
21 the senior leadership team. Was there concern on the Xbox
22 senior leadership team about potential injunctions on
23 Motorola's H.264 and 802.11 standards-essential patents in
24 the ITC in Germany?

25 MR. PRICE: Objection. Vague as to time.

1 MR. CEDEROTH: That was my next question.

2 THE COURT: All right. Let's ask the question then,
3 counsel.

4 MR. CEDEROTH: I was going to ask was there -- The
5 next question is, "When?"

6 THE COURT: I will overrule the objection.

7 THE WITNESS: Yes, there was significant concern.

8 By Mr. Cederoth:

9 Q And did that concern pre-date the relocation of the German
10 distribution center?

11 A Yes, it definitely predated the relocation of the German
12 distribution center.

13 MR. CEDEROTH: No further questions, your Honor.

14 THE COURT: Redirect.

15 MR. PRICE: Yes.

16 REDIRECT EXAMINATION

17 By Mr. Price:

18 Q Are you saying you were involved in the decision to
19 relocate the German distribution maker?

20 A I was not personally a decision-maker in that, but I was
21 involved as the leadership team was making the decision.

22 Q So you weren't involved in the decision on that, right?

23 A I was involved in the discussions that led to the
24 decision.

25 MR. PRICE: Your Honor, in that case, this is a new

1 topic area and we need to recall Mr. Treadwell. This is new
2 information.

3 THE COURT: All right. You may step down, sir.
4 Microsoft may call its next witness.

5 MR. HARRIGAN: Yes, Mr. Pritikin will be examining
6 the next witness.

7 MR. PRITIKIN: Your Honor, we are going to be calling
8 Mr. Kirk Dailey as an adverse witness.

9 THE COURT: All right.
10 Whereupon

11 KIRK DAILEY,
12 Called as a witness, was sworn and testified as follows:

13 THE COURT: Ladies and gentlemen, while they are
14 handing out notebooks, you just heard Mr. Dailey referred to
15 as an adverse witness. That doesn't mean is he an adverse
16 guy. There is a legal distinction here. Witnesses are
17 called by a party as part of their case. Sometimes they are
18 going to offer testimony, which is supportive, sometimes they
19 represent the other side, and they are referred to as an
20 adverse witness. It makes a difference in the form of the
21 question, which information they are permitted to ask about.
22 Don't draw any inferences other than, it is a legal matter
23 that the lawyers understand. If any of you are interested at
24 all, I will talk to you after the case is over with.

25 THE CLERK: Will you state your full name for the

1 record, please.

2 THE WITNESS: Kirk Dailey.

3 DIRECT EXAMINATION

4 By Mr. Pritikin:

5 Q Good morning, Mr. Dailey.

6 A Good morning.

7 Q Now, you are the Motorola executive who signed the
8 October 21 and October 29 letters to Microsoft, correct?

9 A Yes.

10 Q And at the time you were the corporate vice-president for
11 intellectual property at Motorola?

12 A Yes, that's correct.

13 Q And you now hold a similar position at Google?

14 A Somewhat similar. I am the head of patent transactions at
15 Google.

16 Q Now, you are trained as both an engineer and a lawyer,
17 right?

18 A Correct.

19 Q And you ran the business aspects of patent licensing at
20 Motorola?

21 A For a period of time I did, yes.

22 Q And is it also correct that you have been involved in the
23 licensing of Motorola's intellectual property in one way or
24 another since 1990 or 1991?

25 A That's correct, yes.

1 Q Let's talk about Motorola's RAND commitment and what that
2 means. Now, do you understand that there are special rules
3 that govern a licensing of standards-essential patents?

4 A Yes.

5 Q And these arise because of contractual commitments that
6 companies make to standard-setting organizations in order to
7 get their technology included in the standards, right?

8 MR. PRICE: I will object. That calls for a legal
9 conclusion from the witness.

10 THE COURT: The witness can testify to his
11 understanding.

12 THE WITNESS: My understanding is there are rules of
13 engaging with the standards. Whether it is a contract or
14 not, I'm not sure. But there are rules.

15 By Mr. Pritikin:

16 Q As the person who is responsible or certainly was
17 responsible for patent licensing at Motorola, you were aware
18 that you needed to follow the special rules when you tried to
19 license your standards-essential patents, didn't you?

20 A Yes.

21 Q Now, for nonessential patents, those patents for which
22 there is no commitment to license on RAND terms, you can
23 refuse to license the patents, right?

24 A I believe that's correct, sure.

25 Q And in theory you can demand any royalty rate that you

1 want on nonessential patents for which there is no RAND
2 commitment?

3 A I'm not sure what the limitations are. If you are going
4 to license, you need to get the other party to agree to it.

5 Q Do you have the notebook there, Mr. Dailey?

6 A Yes.

7 Q And do you recall that in the ITC trial in this case you
8 testified, right?

9 A Yes.

10 THE COURT: Counsel, you have just said the ITC trial
11 in this case. I am going to sustain the objection to that
12 question and ask you to rephrase it.

13 By Mr. Pritikin:

14 Q Do you recall there was a hearing at the ITC between
15 Motorola and Microsoft in 2012?

16 A Yes.

17 Q And you testified at that?

18 A I did, yes.

19 Q I think we have the transcript of your testimony in the
20 notebook. I believe it is the third tab. Could you turn,
21 please, to Page 2483?

22 A I'm sorry, what page?

23 Q Page 2483. And looking down -- Do you have it there,
24 Mr. Dailey?

25 A Yes.

1 Q Now, looking down at Line 6. Question: "Now for
2 nonessential patents --"

3 MR. PRICE: Your Honor, I am going to object. There
4 is nothing -- there is no impeachment in Lines 6 through 9.
5 He just testified to that. I would request that counsel tell
6 us what lines he is going to read before so I can have a
7 chance to look at it.

8 MR. PRITIKIN: I was going to read Lines 6 through 9.
9 I don't think that is what he just said, your Honor.

10 MR. PRICE: He just said --

11 THE COURT: Counsel, let me read this. I am going to
12 permit the question. I think there is a difference in the
13 second question being asked. The first one is foundation.

14 MR. PRITIKIN: Very well, your Honor.

15 By Mr. Pritikin:

16 Q Beginning at Line 6. Question: "Now for nonessential
17 patents, those patents for which no commitment has been made,
18 you can refuse to license the patents, right?" Answer:
19 "Sure." Were you asked that question and did you give that
20 response, sir?

21 A I did, yes.

22 Q And for nonessential patents, you can get whatever the
23 traffic will bear, can't you?

24 A I'm sorry. We are not looking at this anymore?

25 Q No, this is another question. For nonessential patents

1 you can get whatever the traffic will bear, right?

2 A Yes.

3 Q But for essential patents, when you have made a RAND
4 commitment, you have to make a license available on
5 reasonable and non-discriminatory terms, right?

6 A Generally, that's correct, yes.

7 Q Now, you understand, and you did understand as the head of
8 licensing for Motorola, that companies that implement the
9 standards actually rely on those RAND commitments, didn't
10 you?

11 A I'm sorry. Could you repeat that question?

12 Q You understood, didn't you, that companies that want to
13 implement the standards in their products rely on the RAND
14 commitments?

15 A They can. They certainly could, sure.

16 Q And they know that they can make products that comply with
17 standards, and that they won't be held up later by one patent
18 owner who wants excessive royalty? You understood that, too,
19 didn't you, sir?

20 A I understand they need -- that licenses will be available
21 for people that are willing to take a license, yes.

22 Q Now, you understand that the term "reasonable" in RAND
23 imposes a limit on what you can ask for, doesn't it?

24 A Yes.

25 Q Now, let's talk about the letters that you sent to

1 Microsoft in October of 2010. You were present when the
2 opening statements were given yesterday?

3 A Yes, I was.

4 Q And you recall that in his opening statement Mr. Price
5 talked about the lawsuit that Microsoft filed against
6 Motorola on October 1st of 2010?

7 A Yes.

8 Q Microsoft filed an action in the IPC accusing the Android
9 phone of infringing a number of Microsoft patents, right?

10 A That's correct.

11 Q And you became aware of the October 1st complaint filed by
12 Microsoft virtually the same day, didn't you?

13 A The same day, yes.

14 Q And you also were aware that there was a parallel district
15 court action filed here in Seattle?

16 A Yes.

17 Q And it involved the same patents as in the ITC?

18 A I presume so, yes.

19 Q But this case was stayed, and that is what typically
20 happens when ITC actions are filed, right?

21 A I'm not sure what normally happens in an ITC and a
22 district court case. I will take your word for it.

23 Q In his opening statement Mr. Price made it sound like this
24 was somehow -- when you filed something -- the demand letters
25 to Microsoft, that this was tit for tat, and that both sides

1 had patent claims. But the patent claims were very
2 different, weren't they?

3 MR. PRICE: I will object to it as argumentative as
4 phrased, and also vague.

5 THE COURT: Overruled.

6 THE WITNESS: There were different patents.
7 Microsoft sued on Microsoft patents. And we didn't sue
8 Microsoft. I'm not sure what your question is.

9 By Mr. Pritikin:

10 Q Let me see if I can be a little more specific. The
11 letters you sent to Microsoft dealt with patents that were
12 essential to two standards, 802.11 and H.264, correct?

13 A Yes.

14 Q And let's be clear on this, Mr. Dailey. It is true, is it
15 not, that in the lawsuits that Microsoft brought against
16 Motorola, it did not assert patents against Motorola that are
17 essential to the 802.11 standard or to the H.264 standard?
18 Isn't that correct?

19 A Yeah, there were other standards -- patents --

20 Q That wasn't my question. My question is --

21 THE COURT: Don't interrupt the witness, counsel.
22 Did you finish your answer, sir?

23 THE WITNESS: Yeah, I was just mentioning there were
24 other standards-essential patents in that suit, but not
25 802.11 or H.264.

1 By Mr. Pritikin:

2 Q That's what I want to be clear on. There were no 802.11
3 and no H.264 patents that were asserted, were there?

4 A That's correct.

5 Q Now, you understand that you cannot use
6 standards-essential patents to force someone to pay excessive
7 royalties, right?

8 A I'm not sure what you mean by that statement. We have
9 FRAND obligations, and we license our patents on fair and
10 reasonable terms, non-discriminatory.

11 Q That means you can't force someone to pay excessive
12 royalties, doesn't it? Wouldn't you agree with that, sir?

13 A That's correct. They are typically negotiated between the
14 parties.

15 Q And you can't force -- you can't use your
16 standards-essential patents to try to extract a more
17 favorable license on patents that are not essential to the
18 same standard either, can you?

19 A Again, could you repeat that question?

20 Q Sure. You can't use your standards-essential patents to
21 try to force someone to take a license on more favorable
22 terms on patents that are not essential to the same standard?
23 You wouldn't do that, would you?

24 A Yeah, I'm not sure what you mean by that. I don't think
25 so.

1 Q Well, you would agree with me, wouldn't you, that
2 Motorola's policy is that you do not ask for reciprocity,
3 other than a grant-back license on the same standard, from
4 the prospective licensee?

5 A Yes.

6 Q So in this case, that would be 802.11 and H.264, right?
7 Those were the patents --

8 A Concerning the letter I sent in October, yes.

9 Q Now, the truth of the matter here is, Mr. Dailey, is it
10 not, that you tried to use your 802.11 and your H.264
11 standards-essential patents to extract money and other
12 concessions from Microsoft on patents that were not essential
13 to 802.11 and H.264? Isn't that true?

14 A That is not true, no.

15 Q Well, let's talk about the two letters, and we will go
16 into this in a bit more detail. Let's start with the H.264
17 letter that was sent on October 29th of 2010. Can we put up
18 Exhibit 2? Now, you recognize Exhibit 2 as the letter that
19 you sent to Mr. Gutierrez on October 29th, 2010?

20 A Yes.

21 MR. PRITIKIN: We move the admission of Exhibit 2.

22 MR. PRICE: No objection.

23 THE COURT: Exhibit 2 is admitted. It may be
24 published.

25 (Exhibit 2 admitted into evidence.)

1 By Mr. Pritikin:

2 Q Let's focus on the last sentence of the second paragraph.
3 I think the jury has seen this language a number of times,
4 but I want to ask you a few questions about it, Mr. Dailey.
5 What you said here was, "The royalty is calculated based on
6 the price of the end product, e.g., each Xbox 360 product,
7 each PC laptop, each smart phone, et cetera, and not on
8 component software, e.g., Xbox 360 system software, Windows 7
9 software, Windows Phone 7 software, et cetera." And what
10 this said is that the royalty was going to be calculated
11 based on the price of the end product and not on components,
12 right?

13 A That's correct, yes.

14 Q And so when you wrote this you understood that Windows 7,
15 the operating system, is a component, correct? That's the
16 word you used?

17 A That's correct, because we had an obligation to be
18 non-discriminatory, and my licensing practice was licensing
19 end-product manufacturers. And Microsoft was a little bit
20 different, in that they were a software component
21 manufacturer.

22 Q We will come back to that in a minute. Let's take it one
23 step at a time. There was no doubt in your mind that
24 Windows 7 was just a component, right, because you used the
25 word "component"?

1 A Component software, that's correct.

2 Q And you also were aware at the time that the end price of
3 the computer includes the price of the hardware, it includes
4 many other things besides the software that is supplied by
5 Microsoft, right?

6 A Sorry. Could you repeat that?

7 Q You understood at the time that the end price of the
8 computer includes the price of the hardware and includes many
9 things besides the software that is supplied by Microsoft?

10 A That's correct.

11 Q Now, if a computer sold for \$1,000, it is simple
12 arithmetic that you were asking for a royalty of \$22.50 on
13 that computer, right?

14 A That's correct, yes.

15 Q And the royalty you were asking Microsoft to pay was on
16 the selling price of computers by Microsoft's customers,
17 companies like Dell and Hewlett Packard and Lenovo, right?

18 A Right. This is an initial offer, and we were expecting --

19 THE COURT: Sir, you need to answer his question.
20 His question was something to the effect of specific
21 computers. Let's try and do that and save ourselves a lot of
22 trouble.

23 THE WITNESS: Sure.

24 By Mr. Pritikin:

25 Q Now, at the time you wrote this letter, it is true, is it

1 not, Mr. Dailey, that you were not aware of a single Motorola
2 licensee that was paying a royalty based on the selling price
3 of a product sold by its customer?

4 A That's correct.

5 Q And so it is fair to say, is it not, that you were asking
6 Microsoft to do something that no other Motorola licensee was
7 doing? Isn't that true?

8 A That's right, because we expected to deal with that in
9 negotiations. That's correct.

10 Q We will come to that in a minute. I am asking what you
11 were asking in this letter.

12 A That was the initial offer, yes.

13 Q Now, you do understand that the ND in the term RAND stands
14 for non-discriminatory?

15 A Yes.

16 Q And that means you can't treat different licensees
17 differently?

18 A I'm not sure if it means that exactly. It means you can't
19 be discriminatory, that's correct.

20 Q In any event, it is fair to say that you made a conscious
21 and deliberate decision to ask Microsoft to pay a royalty
22 based on the sales revenues of its downstream customers?
23 Isn't that correct?

24 A That was the initial offer, yes.

25 Q I would like to put up one of the demonstratives that was

1 used in the opening by Mr. Harrigan yesterday. I believe you
2 were present when the openings were given?

3 A Yes.

4 Q Can we put up PDX 1? Now, you understand that the court
5 found that a true RAND rate for Motorola's H.264 patents for
6 Microsoft's products, like Windows, is about a half cent a
7 unit, right?

8 A That's correct.

9 Q Again, it is simple arithmetic, for a \$500 laptop, your
10 letter was asking for \$11.25, right?

11 A Yes.

12 Q Put up slide 18, the next one in the series. Again, you
13 saw this yesterday during the opening?

14 A Yes.

15 Q Now, when you sent this letter, you did have some idea of
16 what the financial impact would be of the offer you had made,
17 didn't you?

18 A We had some rough calculations of Microsoft revenues, yes.
19 But I never asked for \$4 billion a year.

20 Q We will come back to that. I want to find out what was in
21 your head at the time and what you knew, Mr. Dailey. It is
22 easy to go on the internet and find out that worldwide sales
23 of Windows-based PCs earn more than \$200 billion a year, and
24 that 2.25 percent of that is around \$4 billion a year; isn't
25 it?

1 A I believe that's correct, yes.

2 Q And when you prepared the two letters, you actually did
3 some calculations of how much Motorola stood to gain in
4 royalty revenue if Microsoft accepted the terms as set forth
5 in the letters, didn't you?

6 A I don't recall those calculations.

7 Q Could you turn back to the testimony you gave in the ITC,
8 sir?

9 A Sure.

10 Q And turn, please, to Page 2544.

11 MR. PRITIKIN: And I would propose to read, your
12 Honor, Lines 4 through 10. Actually 4 through 14.

13 MR. PRICE: 4 through 14?

14 MR. PRITIKIN: Yes.

15 MR. PRICE: No objection.

16 By Mr. Pritikin:

17 Q Mr. Dailey, looking at the transcript. Question: "When
18 you put together the two letters that we looked at, did you
19 estimate how much Motorola stood to gain in royalty revenue
20 if Microsoft accepted the terms as set forth in the letters?"
21 Answer: "We had some calculations around in line with that
22 somewhere, yes." Question: "Okay. So you knew that there
23 were billions of dollars of Xbox consoles sold every year?"
24 Were you asked those questions and did you give those
25 answers?

1 A Yes.

2 Q So you were aware of both the Xbox and Windows revenues?

3 A Yes.

4 Q Now, the 2.25 percent in your letter was going to be based
5 on the end sales price of the computers and other products
6 that had Windows in it. But even if you had attached the
7 2.25 percent just to Windows, you knew that that was going to
8 be a very large number by itself, didn't you?

9 A It is a large number, yes.

10 Q In fact, you were asking Microsoft to pay Motorola many
11 times each year what Motorola received from all of its other
12 licensees for all of its patents combined, right?

13 A I was actually expecting a negotiation with Microsoft
14 based on that letter.

15 Q Not my question, sir. I am asking about the letters. The
16 letters asked Microsoft to pay Motorola a royalty that was
17 many times the combined amount you were getting from all of
18 your other licensees on an annual basis?

19 A Yeah, I don't know that I did that calculation, but it is
20 probably true.

21 Q Now, you didn't think there was any possibility when you
22 sent this letter, did you, that Microsoft would agree to pay
23 you a royalty on the end-seller price of all of the computers
24 in the world that have Microsoft software on them for your
25 piece of the H.264 technology?

1 A I was expecting to engage in a negotiation.

2 Q Not my question, sir. My question is, you didn't expect
3 that Microsoft would agree to pay what was in these letters,
4 did you?

5 A I don't recall whether I did or did not.

6 Q Let's turn to the other letter, the letter on 802.11. Can
7 we put up Exhibit 1? Is this a copy of the letter you sent
8 on October 1st -- excuse me, October 21st, 2010?

9 A Yes.

10 MR. PRITIKIN: And Microsoft moves the admission of
11 Exhibit 1, your Honor.

12 MR. PRICE: No objection.

13 THE COURT: Exhibit 1 is admitted and may be
14 published.

15 (Exhibit 1 was admitted into evidence.)

16 By Mr. Pritikin:

17 Q Now, again, you heard in the opening Mr. Harrigan say that
18 your demand for Motorola's 802.11 essential patents equated
19 to a royalty of up to \$9 per Xbox console, and that a true
20 RAND royalty was less than three and a half cents. Do you
21 recall that?

22 A Yes.

23 Q And, again, simple arithmetic, if the Xbox console, an
24 expensive one, sells for \$400, 2.25 is \$9, right?

25 A That's correct.

1 Q Now, in the same letter you also asked for a royalty on --
2 There is a reference to Windows mobile software. Do you see
3 that? It is further down. It is the last sentence in the
4 second paragraph, that asks for Motorola's standard terms.
5 You said, "The royalty is calculated based on the price of
6 the end product, e.g. Xbox 360 product, not a component
7 software, e.g., Windows mobile software"?

8 A Yes, that's correct.

9 Q So at the time you sent this letter, you understood that
10 Windows mobile software was a component, and that it would be
11 put in an end product like a mobile phone?

12 A That's correct, yes.

13 Q But you wanted a royalty on the phone, not on the software
14 supplied by Microsoft, right?

15 A Yes.

16 Q And a mobile phone would be a phone sold by a Microsoft
17 customer, like Nokia, or one of the other phone makers?

18 A That's correct.

19 Q Now, you understand in this case Motorola has hired an
20 expert to testify by the name of Gregory Leonard?

21 A I recognize the name, yes.

22 Q Well, you talked to him, didn't you?

23 A I believe I did, yes.

24 Q He submitted an expert report in which he said he had a
25 conversation with you. Do you recall that conversation?

1 A I --

2 MR. PRICE: Objection, your Honor. This is vague,
3 ambiguous.

4 THE COURT: Overruled.

5 By Mr. Pritikin:

6 Q He said in his expert report that he had a
7 conversation with --

8 MR. PRICE: Objection, your Honor. This is hearsay
9 at this point. It has not been admitted and it is not
10 admissible, the expert report.

11 THE COURT: I have overruled the objection. He is
12 not questioning on the expert report, at least thus far; he
13 is asking if he had a conversation.

14 MR. PRICE: He is reading --

15 THE COURT: Don't argue with me, counsel. I have
16 ruled. Ask your question, again, please.

17 By Mr. Pritikin:

18 Q You said in his report he talked to you on May 29th, 2013.
19 You don't disagree with that, do you?

20 A I don't recall. But that's fine. I don't disagree with
21 that.

22 Q Now, I want to ask you about a couple of things that
23 Dr. Leonard said, and I want to find out whether this came
24 from you and whether you agree with what he said. In
25 Paragraph 66 of his report --

1 MR. PRICE: I object to the representations as to
2 what Mr. Leonard said. That's hearsay.

3 THE COURT: I am going to sustain that objection.

4 MR. PRITIKIN: I am happy to show him a copy of the
5 report, your Honor.

6 THE COURT: It is still going to be hearsay.

7 MR. PRITIKIN: The report is, but I am not offering
8 it for the truth of the matter asserted. I want to find out
9 what it is -- whether Mr. Dailey agrees with these
10 statements, which I think is a proper subject of examination.

11 THE COURT: Why don't you make a statement then, and
12 not attribute it to a witness who has not yet testified.

13 MR. PRITIKIN: Absolutely. That's fine.

14 By Mr. Pritikin:

15 Q Let me make a statement and find out if this is something
16 you agree with, Mr. Dailey. "As of October 2010, Motorola's
17 802.11 and H.264 standards-essential patent portfolios had
18 not been separately licensed." Would you agree with that?

19 A "Separately licensed," meaning what?

20 Q Meaning licensed by themselves. Stand-alone.

21 A I think that's correct a statement, sure.

22 Q And while these portfolios had been included as licensed
23 patents in some Motorola license agreements, these licenses
24 were all broad and complex cross licenses covering hardware
25 with the primary focus generally being the cellular

1 standards-essential patents; you would agree with that, too,
2 would you not?

3 A I don't have the knowledge of all of the license
4 agreements at Motorola, but certainly with respect to
5 licensing in the mobile device business, I believe that's
6 accurate.

7 Q Let me read you another statement.

8 A Because there were other agreements with Handheld Products
9 and with Terabeam, et cetera, that were 802.11-only based
10 agreements.

11 Q Now, it is difficult or impossible to break out a separate
12 royalty rate for the 802.11 and H.264 patent
13 standards-essential patent portfolios in these complex
14 cross-license agreements, you would agree with that, too,
15 would you not?

16 A Sorry? That it is difficult to break them out?

17 Q Yes.

18 A I guess -- Yeah, I guess you could, but it is difficult.

19 Q Now, let me read you another statement. "Accordingly,
20 Motorola had"-- And this is in 2010. "Accordingly, Motorola
21 had no past experience on which it could draw when it
22 attempted to negotiate a RAND license with Microsoft." Do
23 you agree with that statement?

24 A Could you reread it? I apologize.

25 Q Sure. "Accordingly, Motorola had no past experience on

1 which it could draw when it attempted to negotiate a RAND
2 license with Microsoft."

3 A No. We drew on our licensing experience with our H.264 --
4 with our SEPs at 2.25 percent. That's what we drew upon.

5 Q The SEPs you are talking about are for the cellular
6 licenses or the cross licenses, the complex licenses, aren't
7 they? You didn't have a stand-alone license as of 2010 that
8 was comparable for 802.11 or H.264, as of October 2010, did
9 you, sir?

10 A No. We were licensing -- I drew on my experience of
11 licensing SEPs in the mobile space. It was a little bit
12 different because Microsoft was a software -- as you pointed
13 out, software components and Xbox entertainment systems.

14 Q The truth is, in October of 2010 you did not have a basis
15 for thinking that your H.264 or 802.11 portfolios were
16 actually worth 2.25 percent, did you, on a stand-alone basis?

17 A I had a basis for thinking that.

18 Q Well, it wasn't based on the prior license of those on a
19 stand-alone basis, was it?

20 A No. We talked about the RIM agreement, and the fact that
21 it had -- it called out the WLAN portfolio, which is the same
22 as 802.11.

23 MR. PRITIKIN: Your Honor, there was a mention of the
24 RIM agreement. I think there are additional things that I
25 would like to bring to the jury's attention at this point.

1 He interjected it.

2 THE COURT: All right.

3 MR. PRICE: He interjected his reasonable belief.
4 But there is an instruction that -- I will have no objection
5 to a limiting instruction, if I knew what it was.

6 THE COURT: All right. Ladies and gentlemen, I have
7 one great advantage over you, in that this extraordinarily
8 competent individual sitting down there, our court reporter,
9 provides me with a copy of a real time transcript. That
10 allows me to go back and check as to what the question
11 actually said, as opposed to relying on my memory, which is
12 why you will see me from time to time come over here and go
13 back and find a particular thing that I am looking for, which
14 is what is going to happen now.

15 Ladies and gentlemen, one of the things that I said to you
16 yesterday was that at times I would give you a limiting
17 instruction. And we are going to ask you to do some mental
18 gymnastics with this, which is not terribly easy, but you are
19 more than capable of it. Sometimes you are going to hear
20 evidence, and I am going to direct you that the evidence may
21 be considered for one purpose, but it is not to be considered
22 for anything else. The reason is, it is relevant evidence to
23 a purpose in the trial, some issue that is in the trial, but
24 it is not admissible in regards to other issues in the trial.
25 So I will ask to you cleave your mind in half and make that

1 distinction for me.

2 In this instance there was a lot of discussion in the
3 prior trial about the RIM license. RIM is Research in
4 Motion; it makes BlackBerries. And I held that the RIM
5 license could not be used as an indicator as to what is an
6 appropriate RAND royalty rate for Motorola's 802.11 and H.264
7 patent portfolios in its negotiations with Microsoft. The
8 purpose for which the discussion -- you may consider it, is
9 in regards to Motorola's mindset at the time. And for that
10 reason I am going to allow this testimony. But it is not for
11 the purpose of is it an indicator of what the RAND rate
12 should be. You can accept it as an indicator of Motorola's
13 mindset at the time.

14 With that instruction, Mr. Pritikin, your next question,
15 please.

16 MR. PRITIKIN: Thank you, your Honor.

17 By Mr. Pritikin:

18 Q Now, in fact, the RIM arrangement involved a
19 cross-license -- involved a license of lots of Motorola
20 patents, your whole portfolio, everything,
21 standards-essential, nonessential, right?

22 A That's correct, yes.

23 Q Let's talk for a moment about the difference in these
24 standards. I'm not sure the jury has heard about this. A
25 cellular standard is the standard that governs cell phone

1 communications, right?

2 A That's correct.

3 Q And so that is like 3G or 4G, it is what allows a cell
4 phone to work, to communicate, correct?

5 A Yes, that's correct.

6 Q And Motorola has a very strong position with respect to
7 cellular patents, right?

8 A I believe so, yes.

9 Q And historically those are the standards-essential patents
10 that you licensed, if you go back into the '80s and '90s,
11 right?

12 A In the '80s and '90s, right, WiFi and H dot video
13 compression wasn't widely adopted, that's correct.

14 Q And then when you licensed 802.11 and you licensed H.264,
15 you threw that into the licenses of the cellular patents,
16 right?

17 A We were using 802.11 and H.264 in our -- As it got
18 adopted in the mobile space with our competitors, we began to
19 use it as a discussion point.

20 Q But you didn't charge more? You paid 2.25 for the
21 cellular patents, you didn't pay more for 802.11 or H.264,
22 right?

23 A That's right. We had portfolios we believed were worth
24 2.25 percent, and then we didn't stack. So if you developed
25 a WiFi-only tablet, as an example, you may pay 2.25, but if

1 you add cellular to it, it would still be the same price. So
2 we had multiple portfolios that we licensed on the same
3 terms, but then we didn't stack the licensing royalties that
4 would have been due.

5 Q Now, at the time that you sent the letters in October
6 of 2010, the 2.25 percent you are referring to was for a
7 license to your cellular portfolio -- all of your portfolios?
8 That's where the 2.25 percent came from, right?

9 A The 2.25 percent, we were asking -- the initial offer that
10 we sent to Microsoft was for H.264 in one letter and WiFi in
11 the second letter.

12 Q But the 2.25 percent that you have referred to that
13 Motorola had received in the past, that was for the cellular
14 licenses -- the cellular portfolios and the cellular
15 portfolios along with additional --

16 A No. We made initial offers of 2.25 on WiFi and H.264 as
17 well.

18 Q We will come back to that in a minute. But the licenses
19 you had were licenses that granted licenses to the cellular
20 portfolios, along with other things, at 2.25 percent; isn't
21 that correct, sir?

22 A Well, some of the licenses had WiFi licenses in them as
23 well, and H.264.

24 Q Are you referring again to the RIM license?

25 A That's one example, yes.

1 MR. PRITIKIN: Your Honor, I think there is
2 additional information that should be provided to the jury at
3 this time.

4 THE COURT: I will see counsel at sidebar.
5 (Sidebar conference out of the hearing of the jury.)

6 THE COURT: What is it you want to bring forth?

7 MR. PRITIKIN: What I would like to do, your Honor --
8 These are just the findings, the same findings we talked
9 about earlier this morning. I think that these are all
10 established facts, and now he has waded into this and left
11 the impression that they have gotten 2.25 percent on WiFi
12 alone or on H.264 alone. Those are the issues we tried.
13 They haven't. There are extensive findings on this that
14 really contradict what he is saying. Now, you indicated if a
15 witness says something that is inconsistent with these
16 findings, we can use them to impeach him. I'm not sure quite
17 sure of the mechanism your Honor would prefer. But I really
18 think there are four or five of these findings now that put
19 the RIM license in context that we should be allowed to read
20 to the jury. We don't necessarily have to bless it with the
21 imprimatur of the court, in a prejudicial way, but to say
22 these are facts that are undisputed.

23 MR. PRICE: I think, given the last answer, he
24 misunderstood the question. He said we had a license, which
25 is true, and you haven't made a finding one way or the other

1 on. I think what Microsoft wants is for him to say it wasn't
2 separate. And he will say that if he understands that
3 question. But he hasn't waded into whether or not this was
4 the right RAND rate for these two. The question said, and
5 the licenses you had, you didn't have these in them? Well,
6 they did. But they were packaged. And that's all this
7 colloquy has been about. I think you have to clarify, it was
8 packaged with the cellular.

9 MR. PRITIKIN: That isn't what he said. And they
10 tried this argument at the trial last fall, your Honor. They
11 tried to suggest there was a separate call-out, and he just
12 talked about it again, for a device like a WiFi tablet. That
13 was one of the issues that came up in the trial last fall.
14 And he tried to imply, if you read the RIM agreement, there
15 would be a separate, whatever it is, 1.7 percent for that.
16 And you don't have all of that in the findings. And I think
17 it is going to be the jury that it is misleading. To the
18 extent they are trying to offer what his state of mind is,
19 again, it is misleading, because that isn't the way it works.
20 I mean, you spent a lot of time analyzing it.

21 THE COURT: I think it goes to the question of good
22 faith. I mean, if he has a basis for good faith, one of
23 which is this is what we have always done when we offered
24 these terms, I think they are permitted to say that. I am
25 going to go back and reread his answer. I think that it is

1 closer to the position, but I want to make sure I track the
2 language. And if it is, I am going to permit some limited
3 questions in this area.

4 Mr. Price, one thing I will say, since we are out of the
5 presence of the jury, we have a local rule here that says
6 objections are supposed to be you stand up and say,
7 "hearsay." The reason is, some of my colleagues feel more
8 strongly about this, if you start arguing your objections in
9 front of the jury, then you might as well not have asked the
10 question. That's why I shut you down. If I have ruled, I
11 think I understand the objection. If we need a sidebar, ask
12 for it. If you keep talking, you have pretty much let the
13 cat out of the bag.

14 MR. PRITIKIN: In terms of presenting additional
15 material to the jury, how would you prefer that we do it?
16 Can I simply read them and say these are undisputed facts?

17 THE COURT: I think what you should do is say, in
18 general, do you understand it is a determined fact such and
19 such, or you can say, you understand in this trial it is not
20 disputed that. That is probably more neutral language. Let
21 me read this, and I will let you know what the answer is.

22 MR. PRITIKIN: Thank you.
23 (End of sidebar.)

24 THE COURT: Mr. Pritikin, I am going to sustain the
25 objection. Please move on.

1 MR. PRITIKIN: Let me ask a couple of other questions
2 along these lines and we will see what the responses are,
3 your Honor.

4 By Mr. Pritikin:

5 Q Mr. Dailey, you understand that an agreement that licenses
6 Motorola's cell phone portfolio, as well as other Motorola
7 patents may, in terms of value, be dominated by the cell
8 phone portfolio as opposed to the other patents included in
9 the agreement?

10 A I'm not sure what you mean by "dominated." It may or may
11 not be dominated by that. It depends on what the company's
12 product business is.

13 MR. PRITIKIN: Your Honor, may I read from 430?

14 THE COURT: Mr. Price, do you wish to be heard on
15 this before I rule?

16 MR. PRICE: Yes, your Honor. The answer is not
17 consistent with the finding. It may or may not, depending on
18 the portfolio -- I'm sorry, the product business, your Honor.

19 THE COURT: I am going to permit you to ask the
20 undisputed fact question in regards to finding 430.

21 By Mr. Pritikin:

22 Q Mr. Dailey, you do you understand it is an undisputed fact
23 in this case that an agreement that licenses Motorola's cell
24 phone portfolio, as well as other Motorola patents, may, in
25 terms of value, be dominated by the cell phone portfolio, as

1 opposed to the other patents included in the agreement?

2 A Yes, it may be dominated. That's correct.

3 Q Now, you understand that the RIM license agreement
4 provided for a comprehensive settlement of a wide range of
5 litigation between the two companies?

6 A Yes.

7 Q And you understand that there is no evidence tending to
8 prove that RIM would have agreed to royalties for either
9 802.11 or H.264 patents alone, apart from this broader
10 agreement that allowed RIM to avoid an exclusion order on its
11 BlackBerry products?

12 A Where would I -- I'm not sure what you're asking me.

13 MR. PRITIKIN: Again, your Honor, I would like to
14 read then from 431, the last sentence?

15 MR. PRICE: I object. This is not a competent
16 witness.

17 THE COURT: I will sustain that. I don't think this
18 comes in through this witness, counsel.

19 By Mr. Pritikin:

20 Q You do understand that the RIM license agreement is not
21 comparable to a RAND royalty rate between Microsoft and
22 Motorola in this case?

23 A That's correct, yes.

24 Q Now, let's turn to another topic relating to the 2.25
25 percent that you were asking for. You are familiar with the

1 concept of royalty stacking?

2 A Yes.

3 Q And so you know that there are a number of other patent
4 owners besides Motorola that have told the IEEE that they
5 have essential patents?

6 A There are people that made letters of assurances.

7 Q Dozens?

8 A There were a number of them, yes.

9 Q In fact, you would not disagree that there were over 92
10 companies that have provided letters of assurance to the IEEE
11 on 802.11, right?

12 A I don't know the exact number.

13 Q Now, you were aware that there were hundreds of patents
14 that had been declared essential to 802.11 by a large number
15 of companies when you sent the letter to Microsoft, right?

16 A I was not aware of that.

17 Q Well, by the time you testified at the ITC you were aware
18 of that, weren't you?

19 A On the 802.11 standard?

20 Q Yes.

21 A I knew there were other WiFi patents, yes.

22 Q And if one wanted to assure that the royalty rate that
23 Motorola was demanding for its 802.11 standards-essential
24 patents was a RAND royalty, one factor that you could take
25 into consideration is how many other companies had 802.11

1 standards-essential patents of their own?

2 A That is a factor that someone could take into
3 consideration, yes.

4 Q When you sent the letters to Microsoft on 802.11, you had
5 no reason to believe that the Motorola essential patents were
6 any more valuable than the patents of these dozens of other
7 companies, did you?

8 A That's right, I hadn't studied all of them.

9 Q And you are not going to tell this jury that Motorola's
10 802.11 patents constituted any more than only a sliver of the
11 overall technology incorporated into the 802.11 standard, are
12 you?

13 MR. PRICE: I will object as to the competence of
14 this witness to testify on this topic at all.

15 THE COURT: Overruled.

16 THE WITNESS: I didn't study the entire -- all of the
17 patents related to 802.11 before I sent the letter to
18 Microsoft, that's correct.

19 By Mr. Pritikin:

20 Q And no other Motorola witness is going to say in this
21 trial that the 802.11 patents constitute more than a sliver
22 of the overall technology incorporated into the standard, are
23 they, to your knowledge?

24 MR. PRICE: Objection.

25 THE COURT: Sustained.

1 By Mr. Pritikin:

2 Q Let's move on to H.264. And, again, there are a lot of
3 companies that contributed to that standard, aren't there?

4 A I believe so, yes.

5 Q You understand that there are over 52 companies that have
6 declared patents essential to H.264?

7 MR. PRICE: Objection. Vague as to time.

8 THE COURT: I think the witness can answer that.

9 THE WITNESS: I heard someone talk about it
10 yesterday. There are a number of companies that were
11 involved in the development of the standard.

12 By Mr. Pritikin:

13 Q And, again, in terms of its technological contribution to
14 the H.264 standard, you are not in a position, and were not
15 at the time you sent the letters, to say whether Motorola
16 ranked in the top half or the bottom half of the companies
17 that had contributed patented technology to the standard?

18 A That's correct. It was one of our core research areas,
19 but I wasn't sure where our patents -- how they all came out.

20 Q And, again, I will ask you, you are not going to tell this
21 jury that Motorola's H.264 essential patents constitute more
22 than a sliver of the overall technology incorporated into the
23 standard, are you, sir?

24 A No. I said I didn't study all of the patents. I am not
25 going to tell the jury that, that's correct.

1 Q Now, when you sent the 802.11 and H.264 letters, you could
2 have taken into account the royalty stacking potential,
3 couldn't you, in framing a 2.25 percent royalty?

4 A I wasn't aware of any royalty stacking issue at the time I
5 sent the letters.

6 Q That's not my question. You knew -- you could have easily
7 found out how many companies there were that had declared
8 standards, and that would have given you an idea of the
9 proportionality of your asking for 2.25 percent, wouldn't it?

10 A I'm sorry. Could you repeat that?

11 Q You could easily have figured out how many companies had
12 provided letters of assurance? It is publicly available
13 information, right?

14 A Sure.

15 Q In fact, people in your organization did it, like Brian
16 Blasius, right?

17 A I'm not sure.

18 Q Well, there are standards people at Motorola that get
19 involved in standards and are aware of this, and you
20 consulted them at the time you framed these initial offers to
21 Microsoft, didn't you?

22 A Yeah. But Brian Blasius isn't one of those standards
23 people.

24 Q What about Ray Warren?

25 A Ray Warren is.

1 Q He works for you?

2 A No, he does not.

3 Q But he is in the same group, he works in the same building
4 you do in Chicago, right?

5 A Yes.

6 Q And he follows the standards, doesn't he?

7 A Some of them, yes.

8 Q And he participated? People who are involved in that
9 actually participated in establishing your initial offers to
10 Microsoft, didn't they?

11 A I'm not sure if Ray Warren did. But the people on Neill
12 Taylor's team, the litigation licensing attorneys as well as
13 the finance people.

14 Q Now, as a practical matter, no company could afford to pay
15 a 2.25 percent royalty to every company that owned patents
16 essential to 802.11, could they?

17 A Again, I'm not sure I have studied them. I wasn't aware
18 that there was a stacking problem at the time I sent the
19 letter.

20 Q Mr. Dailey, if everybody who had patents that are
21 essential to 802.11 or H.264 came along and said, I want 2.25
22 percent like you did, it wouldn't be feasible, would it, to
23 pay those royalties? You will agree with that?

24 A Yeah. I guess it would be a lot of money if they did
25 that. But they --

1 Q Now -- I'm sorry. I thought you were finished.

2 A My experience is people would negotiate with us, or they
3 would contribute to the standards that they wanted to use and
4 then trade. That's my experience. To avoid that stacking
5 problem.

6 Q Now, even though you didn't -- Did you know what RAND was
7 for your patents or not when you sent the letters in October
8 of 2010?

9 A At the time I sent the letters I believed I understood
10 what RAND was, yes.

11 Q Did you understand what a RAND rate was for your patents,
12 the 802.11 and your H.264 patents?

13 A Specifically with respect to Microsoft, I knew there
14 were -- we would have discussions about how they used them
15 and the value to the products. I didn't understand
16 everything that would result in a RAND license with
17 Microsoft.

18 Q That is not my question. It is a simple question, sir.
19 Did you or didn't you know what a RAND rate was for your
20 patents when you sent those letters in October of 2010 for
21 Microsoft?

22 A Sir, are you asking me did I know what the RAND rate was
23 for Microsoft or did I know --

24 Q Yes.

25 A No, it needed negotiation with Microsoft.

1 Q Did you know what a RAND rate was for your H.264 patents
2 or your 802.11 patents when you sent those letters?

3 A I sent an initial offer that I thought was a fair initial
4 offer.

5 Q My question isn't about the offer. I am asking about the
6 rate. Did you know what a RAND rate was when you sent those
7 letters?

8 A At the time, based on what I knew, I thought what I sent
9 was a fair offer.

10 Q Did you think it was a RAND rate?

11 A It was a RAND offer, yes.

12 Q There is a difference here. I don't want to quibble on
13 words. I am asking you, did you think it was a RAND rate?

14 A I did, yes.

15 Q Now, you actually had some idea of -- you are aware the
16 court found that a RAND rate was much less than the amounts
17 requested in your letters, aren't you?

18 A Yes.

19 Q I mean, orders of magnitude difference, right?

20 A Yes.

21 Q In fact, you did have some idea of what your 802.11 and
22 H.264 patents were worth when you sent the letters, didn't
23 you?

24 A Yes, I did.

25 Q As of 2010 there were over 60 Motorola employees involved

1 in your patent-licensing activities?

2 A That could be. That is probably about right.

3 Q And, in fact, you had a group of some 25, didn't you, who
4 worked for you?

5 A Technology trademarks and patent licensing. But, yes,
6 that's correct.

7 Q And employees in other departments, such as legal, were
8 also involved in patent licensing?

9 A Yes.

10 Q In fact, some of the people on your team were involved in
11 coming up with the terms that you put in the Microsoft
12 letters, right?

13 A That's correct.

14 Q And Neill Taylor, who is the chief IP counsel, also had a
15 team that helped you put those letters together, right?

16 A He is part of that team you referred to, yes.

17 Q Well, let's talk a little bit about what you knew when you
18 sent these letters to Microsoft. And I want to start with
19 H.264. Now, Motorola had been a long-time participant in the
20 video standards and had contributed for a number of years?

21 A That's correct, yes.

22 Q They participated in the work of the ITU in developing the
23 H.264 standard?

24 A They did, yes.

25 Q And there were employees who had served on the working

1 groups, that is, Motorola employees?

2 A I believe that's correct. I'm not sure.

3 Q Now, you know a Motorola employee by the name of Ajay
4 Luthra, don't you?

5 A I recognize the name.

6 Q Dr. Luthra is a vice-president at Motorola, and he is
7 considered to be a Motorola fellow, isn't he?

8 A I'm not sure of his title.

9 Q From 2001 through 2009, Dr. Luthra was actually a co-chair
10 of the JVT, the group that developed the H.264 standard,
11 right?

12 A There were people involved, yes.

13 Q Dr. Luther was the co-chair, right?

14 A Again, I'm not sure who was the co-chair.

15 Q You know he was involved, right?

16 A I know his name, and I know that Motorola people were
17 involved. I'm not sure that it was AJ Luthra or not.

18 Q Did you know that Dr. Luthra came to Seattle last fall for
19 trial and sat in that chair and testified about his work
20 involving the JVT? Did anybody tell you that?

21 MR. PRICE: Objection. Relevance.

22 THE COURT: Overruled.

23 THE WITNESS: No, I didn't know that.

24 By Mr. Pritikin:

25 Q You would expect Dr. Luthra to know how important or

1 unimportant Motorola's overall contributions to the H.264
2 standard were, wouldn't you?

3 A Again, I am not -- I don't know him that well that I would
4 know what his opinion is.

5 Q Well, there were people at Motorola you could easily have
6 called to find out how important or unimportant Motorola's
7 contributions to the standards were, weren't there?

8 A There were people that worked on the standards, so there
9 were -- there could have been work done. I think there was
10 work done.

11 Q And you also knew about how your H.264 patents were used
12 in the Microsoft products, and you knew enough to understand
13 that 2.25 percent is excessive, didn't you?

14 A The first question is how they were used. We understood
15 that Microsoft used H.264 technology, but we were expecting
16 to discuss with Microsoft the value of that contribution to
17 their products.

18 Q Well, let's see what you did do. So you and others at
19 Motorola specifically investigated the relevance of the H.264
20 patents to Microsoft products, right?

21 A I was not involved in that investigation.

22 Q Would you look again at the testimony you gave. This time
23 let's look at the deposition you gave in this case. It is
24 the 1823 case, deposition testimony. Would you turn, please,
25 to Page 20?

1 A Sorry. The deposition?

2 Q Yes.

3 MR. PRITIKIN: What I would like to read is Page 19,
4 Line 25, excluding the objection, to Page 20, Line 10.

5 MR. PRICE: I have no objection.

6 THE COURT: Yes, you may do so.

7 By Mr. Pritikin:

8 Q Looking at the deposition, Mr. Dailey. Question: "Did
9 you consult an expert before sending the PX-2 letter as to
10 what aspects of the standard were covered by Motorola
11 patents?" Answer: "I have people that would have provided
12 information with respect to the relevance of H.264 to
13 Microsoft products." Were you asked that question and did
14 you give that response?

15 A I presume I did. I'm sorry, which page are you looking
16 at? I am trying --

17 Q 19 over to 20.

18 A I'm sorry. Right at the bottom. Got it. Yeah, that's
19 correct.

20 Q And you also relied on experts within Motorola to
21 investigate the infringement that you thought you found in
22 the Microsoft products, didn't you?

23 A Yes, that's correct.

24 Q Now, let's talk about what you knew about the 802.11
25 patents. Similarly with 802.11, there were Motorola

1 employees who had served on the working groups on the
2 standards, put it together?

3 A That was a question? Yeah, I believe there were people
4 involved in the working groups. Yes.

5 Q And you are familiar with Xbox?

6 A At a very high level.

7 Q Well, you own one, right?

8 A I do.

9 Q And before sending the letters, you actually posted data
10 on what the Xbox sells for, correct?

11 A The average selling price, yeah.

12 Q And you knew what the retail price was of the Xbox
13 console?

14 A Yeah, the selling price. Yeah.

15 Q And, again, you took steps to find out about the
16 analytical work that was done at Motorola to come up with a
17 reasonable royalty for the company's 802.11 essential patents
18 before you sent the letter?

19 A Yeah, there were people that did that for me, like we
20 spoke about before.

21 Q Before you sent the letters, an analysis would be done at
22 Motorola to understand how the patents are used by the
23 company you are asking to take a license?

24 A To the best that we can -- I mean, it is clearly -- We
25 are going to get a better answer from Microsoft themselves

1 when we talk to them. But there was some analysis done.

2 Q And someone at Motorola did technical due diligence on how
3 the Motorola patents applied to the Microsoft products before
4 you sent them the demand letter, right?

5 A To some level, yes.

6 Q Well, the lawyers and engineers who worked for you did an
7 analysis, correct?

8 A There is no lawyers that work for me, but there were
9 engineers that worked for me that worked with lawyers, yes.

10 Q Now, when you sent the letter to Microsoft on 802.11, you
11 understood that the WiFi functionality in the Xbox 360
12 console is provided by a chip purchased from a chip supplier?

13 A I don't think I knew that at the time, but I do now.

14 Q Well, you knew it --

15 A It is not uncommon. I mean, people use chips. I'm not
16 sure it provides all the functionality of WiFi. There are
17 other components that are necessary --

18 Q Well, you certainly understood a chip provides a certain
19 amount of the functionality?

20 A Not me personally. But, sure, a WiFi chip provides some
21 of the functionality.

22 Q You knew enough about WiFi chips to know that they don't
23 sell for a lot of money, just a few dollars, it is a
24 commodity chip?

25 A In 2010? I don't know that I had that study at that time.

1 Q Well, you knew it by the time you testified at the
2 International Trade Commission, didn't you?

3 A I know it now. It is a couple, \$3 or something.

4 Q Now, on the \$400 Xbox, the royalty would have been about
5 \$9. That is about three times the cost of the WiFi chip; is
6 that right?

7 A That's correct, yeah.

8 Q And if you had applied the 2.25 percent royalty just to
9 the chip itself, the WiFi chip, the royalty would have been
10 just pennies, right?

11 A It would have been, yeah, much less, absolutely.

12 Q In 2003 a consulting firm called InteCap --

13 THE COURT: Counsel, are you moving on to a new area?

14 MR. PRITIKIN: I am.

15 THE COURT: We will take our lunch break at this
16 time. Ladies and gentlemen, you should know that all those
17 things that I have told you over and over and over are still
18 true. Please don't discuss the case among yourselves. Wait
19 until you hear all of the evidence. You heard a number of
20 witnesses this morning, but Motorola has not gotten into its
21 case, so we need to you keep an open mind. You are not going
22 to do any research and attempt to talk to anyone else or do
23 internet research about the case. If anyone tries to talk to
24 you about the case, you will tell me about it promptly.

25 Other than that -- I would ask you to come back about --

1 We are going to try and make up some more time. How about
2 1:20, we will ask you to come out, and we will make up ten
3 more minutes, and then maybe we will squeeze five more in the
4 afternoon, and we will be back on schedule.

5 I'm glad that you seven made an accurate prophet out of
6 me. It is an interesting experience to commute into Seattle
7 every day.

8 Ladies and gentlemen, please rise for the jury.
9 (Lunch recess.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

AFTERNOON SESSION

MR. PRITIKIN: A couple of quick items, and we thought it would be more efficient now before we bring the jury back.

One of the depositions that may be played later this afternoon is the deposition of McNeill Taylor. And Your Honor ruled on the objections that had been made. There was one hearsay objection we had made, and I think it may not have been evident from the text that Your Honor got what the basis for the hearsay objection was. And what I wanted to do is have a second to explain to Your Honor what the nature of the hearsay objection is.

THE COURT: Do you have the pages?

MR. PRITIKIN: I do. I was going to hand them up, Your Honor.

So, Your Honor, if you look at page 40, there was testimony from Mr. Taylor about a conversation after the October 21st letter. And he says after, I think, November 9th was when there was a breach of contract action filed, that's when Brad Smith called Scott Offer and said, "Don't worry about this, this is just litigation tactics week." And we had made a hearsay objection to that. And it may be that when Your Honor looked at that, that it did not appear to be a legitimate hearsay objection because it's an admission by Mr. Smith who's obviously an officer of

1 Microsoft.

2 But the problem is evident if you read further down on
3 page 41, and there wasn't a way to signal this in the
4 objections we made, it's a double hearsay problem. And that
5 was the nature of the objection. Because if you look on page
6 41, what you see is that Mr. Taylor said that he did not
7 participate in that conversation. So there's a layer of
8 hearsay in between. He says, "Did you personally participate
9 in any of these phone calls or meetings?" I'm starting at
10 page 40. He says, "I was in the later timeframe. But the
11 meetings I had discussed were telephone meetings that I was
12 not on the call. I might have been in the room, but I wasn't
13 on the call."

14 And so what one has here is two layers of hearsay. And
15 ours was not directed to the fact that this statement is
16 attributed to Mr. Smith, our problem is that there apparently
17 is further hearsay, somewhere between Taylor and Offer, and
18 maybe a whole chain of people in between. Who knows? That
19 was the problem.

20 THE COURT: Line 7 he says, "I just say I may have
21 participated in those other calls in the sense of being in
22 the room and hearing the phone. I just don't remember. I'd
23 have to go back and try to reconstruct. But the later
24 meetings I can't exactly. I remember there was a meeting in
25 the airport." And then the November comment. So help me

1 with the chronology here. When he says "other calls" is he
2 referring to what's above?

3 MR. PRITIKIN: I think he's talking about the other
4 calls, the later ones. And even when he says he may have
5 been in the room, he certainly doesn't say it was on a
6 speaker phone or that he heard it himself. That's the basic
7 problem here, we don't know.

8 THE COURT: In the sense of being in the room and
9 hearing the phone, I interpreted phone to mean phone. All
10 right. Mr. Cannon, do you want to respond?

11 MR. CANNON: Thank you, Your Honor. So we obviously
12 agree with the ruling. We thought this was fully vetted
13 through the designation and counter-designation process. And
14 so we would ask you to keep the ruling that you made the
15 same.

16 And as Your Honor pointed out, as you read through the
17 actual entirety of the exchange -- it's going to be the
18 entirety of the exchange that will be played for the jury --
19 Mr. Taylor is pretty clear, I think, that he was in the room
20 and so he would have heard this phone call that went on
21 between the officer of Microsoft and the officer of Motorola.

22 So we believe the objection was appropriately overruled
23 and we'd ask Your Honor to keep the ruling the same.

24 This section of the transcript I think is helpful to the
25 jury in that it shows some of the interactions that are at

1 issue. Mr. Taylor is no longer with Motorola, and so that's
2 why this was designated. And we think the full playing of
3 this page or two will give the jury the appropriate context
4 and your ruling was correct.

5 MR. PRITIKIN: Your Honor, I think the reference, as
6 I look at this more closely, he says the "later calls." That
7 is not the call that is attributed to Mr. Smith. Those are
8 later calls in November. This call they say was between
9 Offer and Smith, was actually around November 9 and not the
10 later calls in November. He says categorically up above,
11 "The meetings that I have discussed were telephone meetings
12 that I was not on the call."

13 THE COURT: Well, I'll tell you, when I ruled on this
14 I understood him to be in the room and considered it an
15 admission against interest. And it appears, I stress it
16 "appears" that he --

17 MR. CANNON: Your Honor, I just would like to add
18 that it doesn't appear they objected for any lack of
19 foundation, at the deposition. And in addition, the way I
20 interpret it, is that there was a speaker phone, there were
21 two primary participants in the call but others were in the
22 room listening. Because there's teams of people often
23 involved here. There may be one participant who is doing the
24 talking, but others were in the room such, as the chief IP
25 counsel, who was Mr. Taylor, who heard this conversation.

1 THE COURT: I assume Mr. Taylor is not available as a
2 witness in person.

3 MR. CANNON: He is not, Your Honor.

4 THE COURT: I'm going to reverse myself. I can't say
5 there's a sufficient basis that he was attending that or
6 heard that particular reference. I believe it's in this case
7 anyway, because isn't it in one of your exhibits? It's
8 called --

9 MR. CANNON: I think this is the reference, Your
10 Honor, so we had understood from this ruling -- this ruling
11 was before the opening in this case -- so we relied upon Your
12 Honor's ruling in this deposition designation since we don't
13 have the live witness.

14 THE COURT: Okay. I'm going to reverse myself and
15 sustain the objection on hearsay grounds.

16 MR. PRITIKIN: Thank you, Your Honor. The second
17 question came up in Mr. Dailey's testimony this morning.
18 There was a reference he made to the fact that Microsoft was
19 asserting standards-essential patents. And there is an in
20 limine ruling on this. I'm assuming that they've advised
21 their witnesses of the in limine rulings. I didn't say
22 anything because it was just a passing reference. And I
23 don't think it would help at this point to call additional
24 attention to it. But I do think that they should be advised
25 that going forward this is not a suitable subject for them to

1 be intruding on, the subject of in limine rulings.

2 THE COURT: I think both sides can take some share of
3 the blame for that. That question clearly invited the answer
4 you got. So please advise both sides' witnesses to remember
5 my in limine rulings.

6 Mr. Price.

7 MR. PRICE: The matter we want to take up, Your
8 Honor, is apparently Microsoft intends to use this
9 demonstrative during the examination. My understanding, when
10 you're actually in the evidence phase, you can't use
11 demonstratives to show the jury things that are not in
12 evidence. You can't have argumentative demonstratives. Here
13 we have facts which -- you can get the witness to say
14 something, then put it on a demonstrative. But here they're
15 saying things like Microsoft committed to German relocation
16 on March 12th. They need a witness to establish that before
17 you put it on a demonstrative. They need witnesses to
18 establish any fact before they blow it up and show it to the
19 jury. It's just an inappropriate use of demonstrative during
20 the evidentiary-phase of trial.

21 THE COURT: Well, my practice has been that it either
22 has to be a fact that both sides agree to, or the
23 alternative, the court is assured that there will be a
24 witness that testifies to it. And I don't know if that
25 assurance is prepared to be made. When this chart was

1 originally used I couldn't see it so I have no idea what's on
2 it.

3 MR. PRITIKIN: We can give such an assurance, Your
4 Honor, we intend to offer witnesses and fully expect we will
5 establish all of the events on the timeline.

6 THE COURT: Mr. Price, go ahead.

7 MR. PRICE: For example, it's argumentative in the
8 sense that "Motorola demand letter." This witness didn't say
9 it was a demand letter. That there are no "H" patents. That
10 Marvell requests RAND terms.

11 THE COURT: I'm sorry, there are no "H" patents?

12 MR. PRICE: H.264 and 802.11 patents. That Marvell
13 requested RAND terms. There is no foundation, no expectation
14 that this witness is going to be able to testify about any of
15 this. So it's argument, by putting in other witness
16 testimony, expected testimony they're telling us, to then
17 confront with this witness. And that's an inappropriate
18 examination.

19 THE COURT: All right. Mr. Pritikin, do you intend
20 to ask the witness on any of these items?

21 MR. PRITIKIN: No. What I intend to use it for, Your
22 Honor, is as you know --

23 THE COURT: First off, we argue from the podium. And
24 if you're going to come up you need to ask permission. So
25 both of you should follow the rules.

1 MR. PRITIKIN: May I approach?

2 THE COURT: Go ahead, sir.

3 MR. PRITIKIN: The dates are very hard to keep in
4 mind, as Your Honor knows from the chronology that you have
5 requested. And I do intend to ask Mr. Dailey about the
6 sequence of events: When the letters were sent, when the
7 various lawsuits began, when the injunctions were sought in
8 Germany. And I think it's going to be a very helpful aid to
9 the jury in putting these things in the time sequence. It's
10 very hard to keep this straight without doing it. We have
11 witnesses who are going to be providing the evidence that is
12 necessary to support each of these entries.

13 As far as it's argumentative, I'm not putting these words
14 in Mr. Dailey's mouth. I'm not going to do that. I'm
15 assuming he's not going to want to call it a demand letter.
16 I'm not going to ask him to do that. But the critical events
17 on when these things happened, it's going to be very helpful.
18 Otherwise it's going to be very confusing to the jury.

19 THE COURT: I'm going to stay with my usual practice.
20 But I direct that this thing be folded up and put on the
21 ground until it's going to be used. And at that point I'm
22 going to give the jury a cautionary instruction that will
23 follow the cautionary instruction that they get in the
24 finals, that this is not evidence and it's only as good as
25 what it comes in based on.

1 MR. PRITIKIN: Thank you.

2 THE COURT: Any other matters to take up before we
3 bring the jury in?

4 MR. PRITIKIN: Not from us, Your Honor.

5 THE COURT: Mr. Cannon?

6 MR. CANNON: Can I get a clarification on the ruling?
7 Because the objection that was lodged by Microsoft in the
8 designation reached about three or four pages.

9 THE COURT: I took out that one line.

10 MR. CANNON: That one little section?

11 THE COURT: Yes.

12 MR. CANNON: Okay. Thank you, Your Honor.

13 THE COURT: All right. Let's bring the jury in.

14 (The following occurred in the presence of the jury.)

15 THE COURT: You may continue with your examination.

16 Q (By Mr. Pritikin) Good afternoon, Mr. Dailey.

17 A Good afternoon.

18 Q Now, when we broke for lunch, I think we were about to
19 turn to the InteCap study. And I think you said you weren't
20 aware of that InteCap study that was done when you sent those
21 letters in 2010; is that right?

22 A That's correct.

23 Q But you're aware of it now, right?

24 A I am, yes.

25 Q You've heard a fair amount about it. You know what

1 InteCap is, it's an outside consulting firm that values an
2 intellectual property?

3 A I don't know that but I'll take your word for it.

4 Q And you understand that InteCap recommended to Motorola in
5 2003 that the appropriate royalty for products like computers
6 and an Xbox game console would be one-tenth of one-percent?

7 A I have never studied the InteCap report or whatever it is
8 that you refer to.

9 Q You're aware of that, though, weren't you, that the
10 recommendation in the InteCap study is .1 percent. You've
11 heard that?

12 A I haven't, actually.

13 Q Now, you recall in July of 2012 your deposition was taken
14 in this case. Do you recall that?

15 A Yes.

16 Q And the transcript is in the binder. And do you recall at
17 your deposition you were shown the InteCap study, and it was
18 marked as a deposition exhibit and you were asked about it?

19 A I recall it's been put in front of me before, yes.

20 Q Let's confirm that. Could you turn, please, to page 66 of
21 the deposition transcript?

22 A (Witness complies.)

23 Q And you see that you were asked about the InteCap study at
24 that time?

25 THE COURT: I'm sorry, page 66 of the deposition?

1 A Is it the 1823 deposition?

2 Q Yes, it's the 1823 deposition.

3 THE COURT: Page 66?

4 MR. PRITIKIN: Yes.

5 THE COURT: What line? There it is, 23.

6 Q And you see that at that time on July 12th of 2012 it was
7 called to your attention that the InteCap study had
8 recommended a royalty of .1 percent?

9 A Yes. Yeah, I see that.

10 Q At least as of July of 2012 you were aware of the fact
11 that the InteCap study had been done for Motorola and it
12 recommended a royalty of .1 percent, right?

13 A Yes.

14 Q After July of 2012, did you call Mr. Gutierrez at
15 Microsoft and tell him that it was all a big mistake and that
16 the 2.25 percent royalty you asked for for 802.11 should have
17 been just .1 percent?

18 A No. I have never looked into the InteCap study and
19 patents they reviewed or what market they studied. Other
20 than you bringing it to my attention, that's the limitation
21 of my knowledge, sir. So, no, I didn't tell that to
22 Mr. Gutierrez.

23 Q Let's talk about your knowledge of the rates that are
24 charged by patent pools. Now, a patent pool is an
25 organization that licenses patents of a number of companies

1 that are essential to the standard. Would you agree with
2 that?

3 A Yes.

4 Q And there's a pool for 802.11 where a number of companies
5 have agreed to license their patents as a package, as it
6 were?

7 A I'm not aware of one that's active right now. But I know
8 there's at least two initiatives to get one started.

9 Q You're aware there's a Via pool that has members and has
10 802.11 patents, aren't you?

11 A I do recall the Via pool, yes.

12 Q And in the H.264 area, you're aware of the MPEG LA pool
13 that licenses H.264 patents?

14 A Yes.

15 Q That's quite a large pool, over 2,000 patents, right?

16 A There's a lot of patents. I'm not sure how many.

17 Q A couple dozen companies?

18 A Yeah. There's a lot of companies.

19 Q Motorola is not a member of that pool?

20 A That's correct.

21 Q And so to the extent Motorola is using the H.264 patents
22 of the companies in that pool, you're not paying royalties to
23 the pool for those, are you?

24 A We are not, no.

25 Q Now --

1 A We typically negotiate bilateral licenses to get coverage
2 we need.

3 Q Now, at the time you formulated the letters that were sent
4 to Microsoft in October of 2010, did you go back and check to
5 see what the pool rates were to see whether this 2.25 percent
6 was just out of line or how it compared to the pool rates?

7 A So, we were aware of the H.264 pool and the rates. We
8 didn't think they were relevant because pools are different
9 sorts of arrangements than bilateral arrangements. So we
10 were aware of those, yes.

11 Q In fact, the H.264 pool is an indicator of what a RAND
12 rate is for your patents here; is it not, sir?

13 A I think it could be a factor, yes.

14 Q Let's go back to the letter and let's see -- let's put up
15 Exhibit 1, please. Let's pull out the last paragraph.

16 Now, this is a letter in which you had said you want
17 the 2.25 percent, you wanted it on the end product, you
18 wanted it on the Xbox, and then the last two sentences you
19 close the letter by saying, "Motorola will leave this offer
20 open for 20 days. Please confirm whether Microsoft accepts
21 the offer." Now, that's language you drafted?

22 A I didn't draft it, but I reviewed and signed it, sure.

23 Q By the terms of the letter, on day 21 the offer was
24 withdrawn, correct?

25 A It could be open or it could be withdrawn. It's not

1 withdrawn. It just says it will remain open for 20 days.

2 Q Let's look back at the testimony you gave at the ITC, sir.
3 Would you turn to page 2500.

4 A Which number is that? Oh, I have it.

5 Q Page 2500. And I'd direct your attention to page 23 to
6 25.

7 MR. PRITIKIN: May I read those, Your Honor?

8 MR. PRICE: No objection.

9 THE COURT: You may.

10 Q "Question: By the terms of this letter, on day 21 the
11 offer was withdrawn?

12 "Answer: That's correct."

13 Were you asked that question and did you give that
14 answer?

15 A I did, yes.

16 Q Now, your letter asked Microsoft to accept the terms of
17 the letter, right?

18 A Yes.

19 Q Now, you didn't really expect Microsoft to respond to an
20 offer of this sort in 20 days, did you?

21 A Yes, I did. That's why the 20 days is in there.

22 Q You thought they might accept this in 20 days?

23 A The question was whether they would respond. I expected
24 them to respond.

25 Q The question was whether they would accept.

1 MR. PRICE: Objection, Your Honor, that was not the
2 question.

3 THE COURT: That was not the question.

4 Q My fault. Let me ask that question, then, sir. You
5 didn't think that Microsoft would accept this offer in
6 20 days, did you, as stated?

7 A No. I expected them to respond.

8 Q And at the time you sent the letter, you were not aware of
9 another letter where an opening offer was explicitly stated
10 to be left open for 20 days with a statement, "Please confirm
11 whether you accept."

12 A At the time I sent the letter, that's correct. But since
13 then I --

14 Q My question is at the time, sir.

15 THE COURT: You don't want to volunteer.

16 Q I'm asking what was in your head when you sent the letter.
17 You were not aware of another letter like that, were you?

18 A Right. It's common practice to put a time --

19 Q That's not my question.

20 THE COURT: Let him finish.

21 A It's common practice to put a deadline in so you elicit a
22 response from the other side. I don't know of one that said
23 20 days. I think that was the question you asked me before.

24 Q Not my question, sir. Please listen to it.

25 The question is, you were not aware of another letter

1 that said you would leave an offer open for 20 days and ask
2 somebody to accept it, were you?

3 A That's correct.

4 Q Now --

5 MR. PRITIKIN: Your Honor, I have a timeline I'd like
6 to put up that I think would be helpful. With permission of
7 the court.

8 THE COURT: In a moment. Ladies and gentlemen, this
9 is a demonstrative exhibit -- in a moment, sir.
10 Demonstrative exhibits are exactly that. They're
11 demonstrative. They're intended to help you understand the
12 evidence. In and of themselves, they are not an exhibit.
13 Exhibits go back into the jury room with you at the
14 conclusion of the case and you have access to them. These
15 don't because they're not exhibits. And, very importantly,
16 they're no more correct than the material that's going to
17 come in or has come into the trial. So if they misstate a
18 fact, then you're going to have to remember what that
19 demonstrative said and know that it was not supported by
20 ultimately what happened.

21 They are, however -- particularly chronologies -- many
22 times are very helpful to help you follow along with the
23 witness's testimony. So for that reason I'm going to allow
24 Microsoft to use this demonstrative. And I caution you that
25 it is no more accurate than the underlying testimony that

1 needs to come in to justify each of the entries on that.

2 You may now put it up, sir. Ms. Sullivan, if you need to
3 move.

4 MS. SULLIVAN: Thank you, Your Honor.

5 THE COURT: We may have a glare problem, I'm told.
6 Madame clerk, can you adjust the lighting on that side? Any
7 better?

8 A JUROR: It was closer last time.

9 THE COURT: We need to make a little space behind the
10 Microsoft table. Let us know when you can see it well. All
11 right. Everyone can see it now?

12 Mr. Price, I'm not sure where you ended up. If you need
13 to stand up, sir, feel free.

14 MR. PRICE: Thank you.

15 MR. PRITIKIN: Your Honor, may I come up to the
16 timeline for a few questions?

17 THE COURT: Yes.

18 MR. PRITIKIN: I'll come back when I -- all right.

19 Q Now, Mr. Dailey, I want to just get oriented because there
20 are a lot of events here that occurred over quite a sustained
21 period of time. But as far as the letter, the first letter
22 you sent was on October 21, 2010. Do you recall that?

23 A That's correct.

24 Q Okay. And that meant that the 20 days would run on
25 November the 10th of 2010, correct?

1 A I believe that's correct, yes.

2 Q Now --

3 MR. PRITIKIN: I'll go back to the lectern and come
4 back when I need to point to this.

5 Q Now, you sent the demand letters because Microsoft had
6 filed the ITC complaint; is that right?

7 A I sent the initial offer letters that we discussed because
8 Microsoft invited me to put my patents on the table after a
9 phone call with Mr. Gutierrez.

10 Q I understand. But the precipitating event was the fact
11 that Microsoft had filed an ITC complaint on October 1?

12 A They had filed an ITC complaint, yes.

13 MR. PRICE: I object. That's ambiguous whether it
14 caused him to do it.

15 THE COURT: I'll overrule. The witness answered.

16 Q Now, I want to see if we can put the letters that you sent
17 in some context. You were present when Mr. Price made his
18 opening statement and talked about the need for context; do
19 you recall that?

20 A Yes.

21 Q Now, you did not think, did you, that the fact that
22 Microsoft had filed its lawsuit in the ITC eliminated your
23 obligation to provide a license on RAND terms for your
24 essential patents, did you?

25 A I didn't have that thought process. It wasn't part of the

1 process. I was asked by Mr. Gutierrez to put my patents on
2 the table. So we attempted to identify patents to send to
3 Microsoft that were of value to them so we could have a
4 negotiation.

5 Q Mr. Dailey, would you look again at your ITC testimony?
6 And I would direct your attention to page 2558. Page 2558.

7 MR. PRITIKIN: And I would like to read, Your Honor,
8 lines 13 through 20.

9 MR. PRICE: Just a second. It's taking me more time
10 than usual because I'm standing up.

11 No objection.

12 THE COURT: They can be read.

13 Q "Question: So it's fair to say that you didn't think that
14 the fact that Microsoft had filed the ITC complaint, that
15 that eliminated your obligation to provide a license on
16 reasonable and non-discriminatory terms for your 802.11
17 essential patents, did you?

18 "Answer: No. I don't -- I don't -- that's correct."

19 Were you asked that question and did you give that
20 response?

21 A I did, yes.

22 Q The fact that Microsoft had sued Motorola did not change
23 your contractual obligations to the standards-setting
24 organizations, did it sir?

25 A Again, I didn't know I had contractual obligations. It

1 didn't change my behavior, offering what I believed to be a
2 FRAND offer to Microsoft on our 802.11 and H.264 patents.

3 Q Are you saying here today you didn't know whether you had
4 contractual obligations to the standards-setting
5 organizations? Did I hear you say that?

6 A We already discussed this earlier.

7 Q Now, at the time that you sent the letters to Microsoft --

8 MR. PRITIKIN: Your Honor, may I come forward again?

9 THE COURT: Yes.

10 Q The --

11 THE WITNESS: Can I just clarify one thing?

12 THE COURT: He's moved on.

13 Q Now, the first lawsuit that was filed by Motorola was
14 filed on the 21st day after the October 21st letter, was it
15 not?

16 A It was filed on November 9th, I think, or 10th.

17 Q The 10th.

18 Now, at the time you sent the two letters to Microsoft,
19 the letters on October 21st and October 29th, you've
20 testified, I believe, that your litigation team was already
21 preparing the lawsuit, a countersuit?

22 A Yeah. So normal practice -- we were sued by Microsoft, so
23 we were preparing to defend ourselves, yes.

24 Q The point is, you were preparing those lawsuits even as
25 you were sending the letters; is that not true?

1 A I wasn't preparing the lawsuits. That's Neill Taylor and
2 the litigation team. I'm not sure when they started or what
3 they were doing.

4 Q Let's look back at your testimony from the trial last
5 fall. And would you turn please, in the trial testimony, to
6 page 75?

7 A The 1823 case?

8 Q Yes, sir. Would you look, please, at the ITC testimony,
9 page 2498?

10 MR. PRITIKIN: I'd like to read from page 2498, Your
11 Honor, at lines 6 through 10.

12 MR. PRICE: Your Honor, I object. The full answer
13 goes through 19.

14 THE COURT: Well, read through 19.

15 Q "Question: The lawsuits were filed in November?

16 "Answer: I believe so, yeah.

17 "Question: So you were preparing those lawsuits in
18 October, weren't you?

19 "Answer: Yes.

20 "Question: In fact --

21 "Answer: Yes.

22 "Question: You began work preparing those lawsuits as
23 soon as you got the -- you learned of the ITC complaint,
24 didn't you?

25 "Answer: We -- after we -- I know it was certainly

1 after we met with Microsoft, we did start preparing
2 complaints and looking at our patent portfolio, sure."

3 Were you asked those questions and did you give those
4 responses?

5 A I did. The meeting with Microsoft was October 22nd, I
6 believe, that's referring to in that answer. But yes, I did
7 give that answer.

8 Q Now, your practice was that you would not have filed a
9 lawsuit on standards-essential patents without first making
10 an offer, would you?

11 A Yeah, our practice is to negotiate and not litigate unless
12 we find no good result in the negotiation.

13 Q Let's look at your testimony from the trial last fall.
14 Would you turn to page 76.

15 MR. PRITIKIN: I'd like to read lines 8 through 11,
16 Your Honor.

17 THE COURT: 9 through 11?

18 MR. PRITIKIN: Yes, sir.

19 MR. PRICE: I object. I think 3 through 11 is the
20 complete.

21 MR. PRITIKIN: I'll read it all.

22 THE COURT: Okay.

23 Q "Question: And you understood at that time as to
24 standards-essential patents you could not file a lawsuit on
25 those patents without at least first making a license offer

1 to Microsoft, right?

2 "Answer: I don't know whether I could or couldn't, but
3 it was certainly my practice to negotiate.

4 "Question. You wouldn't have filed a lawsuit on
5 standards-essential patents without first making an offer,
6 would you?

7 "Answer: That would be -- that is my practice. That's
8 correct."

9 Were you asked those questions and did you give those
10 responses, sir?

11 A I sure did, yes.

12 Q Now, in truth, when you prepared these letters and sent
13 them to Microsoft, these were a prelude to allow Motorola to
14 be able to say, "We've made an offer. They didn't accept it.
15 Now we can sue." Isn't that what was going on, sir?

16 A No. This was my attempt to negotiate with Microsoft.
17 They requested to put my patents on the table so we could
18 negotiate and come to a reasonable settlement. And that was
19 what I was attempting to do in October of 2010.

20 Q Now during his opening, Mr. Price said that -- he pointed
21 to some other language. Let's put the letter back up. Let's
22 put up Exhibit 1. And I believe Mr. Price pointed to some
23 language in here. Let's look at the second-to-the-last
24 paragraph. Let's pull that one up. I think he pointed to
25 some language that says that Microsoft is only interested in

1 licensing some portion of the portfolio. Motorola is willing
2 to enter into such a license also on RAND terms. And you
3 included language similar to that in both letters, didn't
4 you?

5 A Yes.

6 Q But point of fact when, you have standards-essential
7 patents, isn't it true that people don't license standards on
8 a patent-by-patent basis, it's on a portfolio-basis that they
9 take them?

10 A I think that's a normal practice. But understanding
11 Microsoft's use, I mean, the standards are very complex, as
12 we talked about. You may use all or a portion of those
13 standards. So that's why that was in there, to offer if they
14 only wanted a license to a portion.

15 Q You knew the normal practice was to license on a
16 portfolio-basis, right?

17 A That's been my experience, yes.

18 Q All right. Now, let's talk about the lawsuits that were
19 filed by Motorola.

20 MR. PRITIKIN: Your Honor, may I come up to the
21 timeline, again?

22 THE COURT: Yes.

23 Q Now, you're aware that Microsoft filed the lawsuit in this
24 court on day 20. The letter came in on October 21st, then on
25 November 9th Microsoft filed this lawsuit. And it was after

1 that that Motorola started filing its lawsuits; is that
2 correct?

3 A I believe that's correct, yes.

4 Q And the lawsuits that you filed -- well, you sued on
5 November 10th. You sued in the district court a lawsuit
6 involving Windows and Xbox and 802.11 and H.264, right?

7 MR. PRICE: I object, Your Honor, to the phrase
8 "you."

9 Q Motorola.

10 A Yeah. There were lawsuits filed on November 10th, that's
11 correct. It was more than what you're pointing out, though,
12 I believe. But I'm not an expert on the litigation.

13 Q Then the ITC was filed in November of 2010, and that
14 involved Xbox and both standards 802.11 and H.264?

15 A I know it had an additional non-essential patent as well.
16 But that's correct.

17 Q And then in July of 2011 Motorola filed the lawsuit in
18 Germany to enjoin Windows and Xbox. And that involved H.264?

19 A So, are you asking me --

20 Q If you're aware the suit was filed in Germany.

21 A I know there was a German lawsuit. I didn't know when it
22 was filed.

23 Q Now, Microsoft had filed this case, though, back on
24 November 9th of 2010. And in this lawsuit Microsoft did ask
25 the court to determine what a RAND royalty was, correct?

1 MR. PRICE: Object to lack of foundation --

2 A Again, I'm not sure.

3 THE COURT: Hold on, I have to rule on the objection.
4 I'm going to sustain the objection and ask you to lay a
5 foundation with this witness.

6 Q Mr. Dailey, you've testified before, have you not, that
7 Microsoft, in filing this lawsuit was saying that it wanted
8 the court to order a license be granted on reasonable and
9 non-discriminatory terms?

10 A I don't recall saying that, but --

11 Q Let's take a look at your --

12 THE COURT: I don't think he's finished.

13 A No, I don't recall saying that, but I may have said it, I
14 don't know.

15 Q Let's take a look at your ITC testimony. Let's turn,
16 please, to page 2509.

17 MR. PRICE: Counsel, what's the date of that?

18 MR. PRITIKIN: The first one.

19 MR. PRICE: January 20, 2012?

20 MR. PRITIKIN: Yes.

21 A What was the page?

22 Q Page 2509 to 2510, lines 22 through 2.

23 MR. PRICE: Your Honor, the full context begins at
24 2508, line 10.

25 THE COURT: Mr. Pritikin, what lines do you want the

1 witness to acknowledge?

2 MR. PRITIKIN: 2509, lines 22, to 2510 line 2.

3 MR. PRICE: The foundation of that, Your Honor, comes
4 from page 2508, line 10 on.

5 THE COURT: I'll allow 2509 starting on line 4
6 through 2510. I think we don't need to interject Judge Shaw
7 into all of this.

8 MR. PRICE: I didn't mean to include that.

9 Q "Question: During this period of time in November of 2010
10 you understood, didn't you, that Microsoft wanted a license
11 to the standards-essential patents on reasonable and
12 non-discriminatory terms?

13 "Answer: So that's not my, my understanding. I did
14 not read this document. But my understanding was that they
15 had rejected our offer, was my broad understanding.

16 "Question: And what's your understanding based on that
17 Microsoft rejected the offer? Did you get a letter saying,
18 'I reject the offer'?

19 "Answer. I spoke to the litigation attorneys in our
20 department.

21 "Question. Did you ever see a letter from Microsoft
22 saying, 'I reject the offer'?

23 "Answer: No.

24 "Question: Okay. And in point of fact as you look at
25 the prayer for relief, Microsoft" --

1 MR. PRICE: I'll object. This is irrelevant. He's
2 asking him to read a document in the deposition.

3 THE COURT: Let's stop on line 12.

4 MR. PRITIKIN: Of the next page, Your Honor?

5 THE COURT: No, this page.

6 MR. PRITIKIN: I'm already beyond that. That's fine.

7 MR. PRICE: Officially I move to strike lines 12
8 through whenever he stopped.

9 THE COURT: They're stricken. Ladies and gentlemen,
10 disregard them.

11 MR. PRITIKIN: May I approach the timeline, Your
12 Honor?

13 THE COURT: Yes.

14 Q Now, you understand that in the International Trade
15 Commission that the remedy that's available is an exclusion
16 order or a cease-and-desist order?

17 A Yes.

18 Q The ITC doesn't give monetary damages, does it?

19 A That's correct.

20 Q So what you wanted in the ITC was an order that would
21 block the importation of Xbox consoles if you were
22 successful, right?

23 A I think that's the remedy, yes, that's correct.

24 Q And, of course, you sought an injunction in Germany as
25 well, right?

1 A I don't know, but I believe that's correct, yes.

2 Q Now, you understand that when you file a patent
3 infringement case you can get damages in the case without
4 asking for an injunction, can't you?

5 A I don't know. You know, every case I've ever been a part
6 of on the receiving end, it always requests either an
7 exclusion order or an injunction.

8 Q But a court can award damages, can it not? You know that
9 from your legal training?

10 A Sure.

11 Q And the damages could include a RAND royalty, right?

12 A Yes. The court makes the determination. But I think
13 everyone asks for an injunction, it's normal practice.

14 Q But you don't need to ask for the injunction to get
15 damages, do you? You know that as a lawyer?

16 A I think you're probably correct, yeah.

17 Q Let's put up Exhibit 6087.

18 MR. PRITIKIN: Your Honor, what I would like to show
19 -- we won't display it, but let's put up 6087, page 9.

20 THE COURT: Ladies and gentlemen, are you able to see
21 this?

22 A JUROR: We were and now it's gone.

23 MR. PRICE: I don't see that in the binder.

24 THE WITNESS: I can't see it, if I'm supposed to.

25 THE COURT: Either can I.

1 Q Mr. Dailey, this is a copy of a pleading that was filed by
2 Microsoft in this court in this case on September 30, 2011.
3 Do you recognize it as a pleading?

4 A If you tell me it is, I'll believe you. I don't know
5 where it says pleading, but that's fine.

6 Q I'd like to direct your attention to page 9, the first
7 sentence on page 9.

8 A This says it's filed under seal, so does that mean -- I
9 don't think I have access to this normally.

10 THE COURT: You do now.

11 Q Would you look at the first sentence on page 9, sir?

12 MR. PRICE: Your Honor, I object to foundation if the
13 witness has never seen the document.

14 THE COURT: I don't know what the question is yet, so
15 we'll find out if he needs to know anything about it.

16 Q Mr. Dailey, in the first sentence the statement is made in
17 the pleading --

18 MR. PRICE: Objection to --

19 THE COURT: Counsel, where are you going with this?
20 I mean, this is your pleading. You're not going to have him
21 read your pleading.

22 MR. PRITIKIN: Should I explain it at side bar, Your
23 Honor?

24 (Court and counsel met at side bar as follows:)

25 MR. PRITIKIN: It's this sentence, Your Honor, where

1 it says, "Microsoft is seeking and remains ready and willing
2 to take a license to Motorola's H.264 and 802.11 declared
3 essential patents on RAND terms." It's a very important
4 statement. It's a statement by Microsoft that it was willing
5 to do it. He's made the statements that he didn't think we
6 were ever willing to do it, and it dates it as of September
7 of 2011.

8 THE COURT: Then you should ask him if he is aware
9 that Microsoft made the statement.

10 MR. PRITIKIN: That's fine.

11 MR. PRICE: Your Honor, actually I would object that
12 it assumes facts not in evidence. This is the wrong witness
13 to do this with.

14 THE COURT: He has said -- earlier in his testimony
15 he commented on the not to take it on RAND terms.

16 MR. PRICE: He didn't say forever.

17 (The side bar concluded.)

18 Q Mr. Dailey, were you aware that on September 30th of 2011
19 Microsoft had said to this court that it was ready and
20 willing to take a license to Motorola's H.264 and 802.11
21 essential patents on RAND terms?

22 A I don't know that specific date. I know at some point in
23 time Microsoft said they were willing to take a RAND license.
24 I'm not sure what the date was.

25 Q So as the person who was the head of licensing, certainly

1 you were aware that Microsoft had made a statement that it
2 was ready, willing and able to take a license on the terms
3 determined by this court?

4 A Yeah. But it was sometime in 2012, not in 2010.

5 MR. PRITIKIN: Well, Your Honor, may I --

6 THE COURT: Yes, you can ask if this witness has seen
7 this document. And if he says no --

8 Q I'm holding a pleading that was filed by Microsoft. I
9 take it you have never seen this document, that's what you're
10 saying?

11 A I have never, no. I was not under the protective order,
12 so I had no access to any litigation documents.

13 Q But no one told you, as the head of licensing, that back
14 in September of 2011 Microsoft had said it was ready, willing
15 and able to take a license on terms set by this court?

16 MR. PRICE: I'm going to object. That may go into
17 privileged areas.

18 THE COURT: I'm going to permit that yes or no
19 answer.

20 A I was aware that Microsoft was willing to take a license
21 at some point in time. I don't recall the date.

22 Q Now, you did understand that the commitment that had been
23 made applied worldwide, right, the RAND commitment?

24 A Yes. That's the way we practiced. Whether it was a
25 requirement or not, that's how we licensed.

1 Q That included Germany. It wasn't just the United States.
2 You had to license on reasonable or non-discriminatory terms
3 for anywhere in the world, right?

4 A To willing licensees, yes.

5 Q Were you aware that this court said that it was going to
6 hold Microsoft to that commitment? Microsoft had said it
7 would take a license on RAND terms, and this court said it
8 would hold us to that. Were you aware of that?

9 A I don't know the details of the litigation.

10 Q Now, let's talk about what happened --

11 MR. PRITIKIN: May I come back up to the timeline,
12 Your Honor?

13 THE COURT: Yes.

14 Q After September of 2011, the pleading I was asking you
15 about, so subsequent to that the trial in the ITC -- you went
16 ahead, didn't you, there was a trial in ITC in January of
17 2012?

18 A Yeah, sorry. Yes.

19 Q And by April of 2012 Motorola was on the verge of getting
20 an injunction in Germany, right?

21 A Again, I'm not exactly sure.

22 Q Now it's true, is it not, sir, that your goal or your
23 strategy here was to beat the clock to try to get an order
24 from the ITC, or from Germany, before this court was able to
25 set the RAND royalty that Microsoft said it would take?

1 That's what you were trying to do, isn't it?

2 A My goal was to negotiate a reasonable cross-license with
3 Microsoft. I wasn't in charge of litigation strategy. And
4 I'm not sure what you're trying to imply with my behavior,
5 but --

6 Q Well, in point of fact, you were aware of the fact that an
7 injunction was being sought in Germany, weren't you?

8 A I was aware there was German litigation and there was
9 something -- yeah, there was an injunction or an Orange Book
10 license being discussed.

11 Q It also came to your attention that at some point this
12 court enjoined Motorola from enforcing any injunction it got
13 in Germany. That came to your attention, didn't it, sir?

14 A Yes.

15 Q Now, if this court hadn't stepped in and you had gotten
16 that injunction in Germany, you really would have had
17 Microsoft over a barrel, wouldn't you, at that point?

18 A Um, I don't know. I was hopeful that we could get a
19 settlement with Microsoft through negotiation. That's what
20 we were trying to do.

21 Q What you wanted were concessions you weren't entitled to
22 by using your standards-essential patents; isn't that true,
23 sir?

24 A That's not what I said, no.

25 Q Let's turn to the subject of Marvell. Now, you did learn

1 at some point that part of the WiFi capability in the Xbox is
2 provided by a chipset that Microsoft purchases from Marvell?

3 A Yes.

4 Q And you recall that in 2011 Marvell asked for a license to
5 Motorola's 802.11 essential patents?

6 A I know they asked for a license. I don't know the date.
7 But they did ask for a license, yes.

8 Q You knew that the whole reason Marvell was asking for the
9 license was to cover the chips it sold to Microsoft for the
10 Xbox, right?

11 MR. PRICE: Object to foundation.

12 THE COURT: Overruled.

13 A I wasn't directly involved in communications with Marvell,
14 so I don't really know the reason why. But that makes sense.

15 Q At some point an offer was made to Marvell, right?

16 A Yeah.

17 Q By Motorola?

18 A By Motorola, yeah.

19 Q And you were involved in the decision-making to approve
20 the offer that was made to Marvell, right?

21 A Yeah. I knew the offer was being made to Marvell.

22 Q You were involved in the decision-making to approve the
23 offer, weren't you, sir?

24 A Yes.

25 Q So let's go back. You understood the whole reason Marvell

1 was asking for this was to cover the chips it was selling to
2 Microsoft, didn't you?

3 A Again, I don't recall that fact. But that could have been
4 the case.

5 Q And you also understood that you can't double dip. You
6 testified before that you can't hit up the chip supplier and
7 the end-user, right?

8 A Right. We only license our patents to one person, that's
9 correct.

10 Q And you understood you had an obligation to license
11 anyone, whether it was Marvell or Microsoft?

12 A Sure. That's correct.

13 Q Now, you were here yesterday in the opening statements
14 where Mr. Price talked a little about Motorola's licensing
15 offer to Marvell. Do you remember that?

16 A I was here, yes.

17 Q And do you recall Mr. Price saying that Motorola had sent
18 the standard letter, 2.25 percent on the end product, to
19 Marvell. Do you remember that?

20 A Yes.

21 Q Now, the letter that Motorola sent to Marvell wasn't a
22 standard letter at all, was it?

23 A You're talking about the offer?

24 Q Yes.

25 A It was a draft agreement, I believe.

1 Q It was a draft agreement that was prepared and sent. Why
2 don't we take a look at it. That's Exhibit 16.

3 Do you recognize Exhibit 16 as a copy of an e-mail and
4 an attached agreement sent by Mr. Kowalski from Motorola to
5 Jennifer Ochs at Marvell on November 25, 2011.

6 A That's what it appears to be, yes.

7 Q Now, there was something very unusual about this letter
8 and offer that Mr. Price didn't mention yesterday, wasn't it?
9 And that's the fact that this agreement carved out Microsoft.

10 MR. PRICE: I'm going to object. The question is
11 argumentative and compound.

12 THE COURT: Overruled.

13 A I'm sorry, could you repeat the question?

14 Q Yes. The draft agreement you sent to Marvell carved out
15 Microsoft. So it excluded any chips Marvell would sell to
16 Microsoft. It covered chips they would sell to other
17 companies, but it carved out Apple and it carved out
18 Microsoft; isn't that right?

19 A It may have. I don't know where that section is.

20 Q Could you turn to the last page. You call them
21 repudiating parties. You see Microsoft Corporation is the
22 first company you listed there?

23 A Yeah. There were three companies that we were currently
24 in litigation with that we put in what's called defensive
25 suspension, so that we can negotiate directly with those

1 parties. That's why that term was in there.

2 Q But you knew the whole purpose of Marvell coming to
3 Motorola and asking for a license was to cover the chips it
4 sent to Microsoft. And then you sent back a license
5 agreement that excluded Microsoft. That's what happened,
6 isn't it, sir?

7 MR. PRICE: I object. That's compound.

8 THE COURT: I'll overrule the objection.

9 A I think you already asked me the question and I answered.
10 I wasn't aware that they were doing this on behalf or only
11 for the sole purpose of Microsoft.

12 Q Well, the people at Motorola knew that this was being done
13 because Marvell had been asked to do it on behalf of
14 Microsoft. Mr. Kowalski knew that, didn't he?

15 MR. PRICE: Objection, lack of foundation.

16 THE COURT: I'll sustain that objection. You need to
17 lay a foundation.

18 Q You said you were the one who approved this offer. You
19 didn't know that Marvell was asking for this on behalf of
20 Microsoft?

21 A I knew Marvell asked for a license and we sent a draft to
22 Marvell.

23 Q Now, you knew that Marvell, which was in the business of
24 selling \$3 or \$4 chips, was hardly in a position to pay a
25 2.25 percent royalty on the end-product price of products

1 that had its chip in it, didn't you?

2 A I didn't study Marvell's financial situation before this
3 letter was sent out, I don't think.

4 Q You don't have to study very hard to know that the
5 commodity chips sell for a few dollars. You said you knew
6 that.

7 A Yeah. I thought it was \$3, but that's fine.

8 Q And if you're asking for a 2.25 percent royalty to be paid
9 by Marvell on the price of products that its customers sell,
10 that's not a very good business model for Marvell, is it?

11 A I don't know about Marvell's business model, but it's our
12 standard opening offer, which is based upon the finished
13 equipment, the royalty is based upon that, that's our
14 standard.

15 Q But you don't have any license agreements where people are
16 paying you on the end-product price of their downstream
17 customer. You told us that earlier.

18 A Right. Because we negotiate different arrangements that
19 cover that issue.

20 MR. PRITIKIN: No further questions, Your Honor.

21 THE COURT: Mr. Price.

22 MR. PRITIKIN: I neglected to move the admission of
23 Exhibit 6087 -- no, the agreement, 16.

24 MR. PRICE: If that's the right number, I have no
25 objection.

1 THE COURT: All right. 16 is admitted.

2 (Exhibit No. 16 was admitted into evidence.)

3 THE COURT: Mr. Price, let me say one thing before
4 you start.

5 Ladies and gentlemen, normally in a lawsuit a party calls
6 a witness. And we talked about adverse and non-adverse
7 witnesses. And then the other side cross examines. In an
8 effort to use your time more wisely, I have asked the
9 parties, and they've agreed, that we're only going to call a
10 witness once. So part of the testimony that Mr. Price is now
11 going to elicit would be his cross examination of Mr. Dailey
12 based on things that Mr. Pritikin had asked; but also will be
13 questions that he would ask him were he calling him in his
14 own case in chief.

15 I've assured them you're all smart enough to figure this
16 all out because it really won't make much of a difference.
17 And it means your time is going to be spent more wisely. And
18 I appreciate counsel cooperating in this. It is clear some
19 of our witnesses are coming from out of town and it's a way
20 to get them on and off and use everyone's time wisely.

21 CROSS EXAMINATION

22 BY MR. PRICE:

23 Q Very quickly, we were talking about Exhibit 16, I believe,
24 which includes a draft agreement that was sent to Marvell.
25 And you were asked questions, you recall, as to whether or

1 not you knew that the sole purpose that Marvell did this was
2 because of Microsoft. Do you recall those questions?

3 A That's correct.

4 Q Now, with respect to what you call defensive -- what's the
5 name of it again?

6 A Defensive termination or defensive suspension.

7 Q You had in a draft a defensive suspension paragraph. I
8 can't find it here. If you can point it out to me. In fact,
9 why don't you do that. I see the names here, but --

10 A So it's in section 3.4, I believe.

11 Q And does section 3.4 then refer to Annex C?

12 A No. Repudiation is 3.5.

13 Q In fact, maybe we can put that up so the jury knows what
14 we're talking about. This is paragraph 3.5 of Exhibit 16.
15 This is the defensive suspension provision you're talking
16 about?

17 A Yes.

18 Q Now, if Marvell had asked for a license on behalf of
19 anyone, given the state of affairs at the time they asked for
20 the license, would you have put in a defensive-suspension
21 provision?

22 A It's a normal part of our practice, yes.

23 Q So if Samsung had asked for a license, and Samsung
24 manufactured chips, would you have asked for a
25 defensive-suspension provision?

1 A It's a normal part of our agreement. It may get
2 negotiated out through negotiations, but generally we put
3 this in place to protect ourselves. We're concerned about
4 being able to manufacture products ourself and sell products.
5 So we don't want to give an important license to a party that
6 then sells those chips to someone who's fighting with us and
7 trying to keep us out of the marketplace.

8 So we put in provisions that would allow us to suspend or
9 terminate the license with respect to any party that's a
10 customer of Marvell, in the event they attack us, so that we
11 can have a negotiation directly with that third customer.
12 And it's not just me, it's kind of an industry practice.

13 Q If we look at the last page here, you see there's an
14 Annex C where it lists repudiating parties and it lists
15 Microsoft, Apple Inc. and Gemalto?

16 A Yes.

17 Q Why are those names there?

18 A Those are parties that were currently in litigation with
19 us at the time we sent the draft, apparently.

20 Q At the time of the draft here, if you see this is a -- you
21 see what refers to -- there's a date here, at least on the
22 last line, where it says, "Confidential discussion draft
23 subject to October 12, 2011," et cetera. Do you see that?

24 A Yes.

25 Q So in the October 2011 timeframe, had Microsoft done

1 anything to try to keep Motorola's products out of the
2 marketplace?

3 A Yes. We had been sued in the ITC on all of our Android
4 phones. And there were various district court cases as well
5 pending at that time.

6 Q In October of 2011, what was the significance of the
7 Android operating system software to Motorola's business?

8 A So, we had decided at some point in the 2009 timeframe to
9 move exclusively onto the Android operating system as the
10 smartphone operating system for our products. So I believe
11 around 60 percent of our revenue was dependent upon sales of
12 Android devices.

13 Q And was that a decision which Motorola had kept to itself?

14 A It was pretty apparent in the marketplace. You couldn't
15 go buy a Motorola phone that had a Microsoft operating
16 system, or a Motorola phone that had a Symbian operating
17 system at the time, it was only Android.

18 Q And before October 1, 2010, and first let me just ask you
19 generally, had you had discussions with anyone at Microsoft
20 about business relationships between Microsoft and Motorola?

21 A Sure.

22 Q How would you characterize the discussions you had before
23 October 1, 2010?

24 A They were very amicable. There was -- there is always
25 some levels of disputes to certain things. But I had

1 actually reached out and set up a meeting for October 22nd to
2 meet with Brad Smith, the general counsel, and Horatio
3 Gutierrez, the head of licensing, to make sure that we had a
4 good relationship. There were different touch points
5 throughout the business. We had a Microsoft business
6 representative that managed kind of the relationship on a
7 day-to-day basis.

8 Q Let me ask you, prior to October 1, 2010, prior to then,
9 had Microsoft ever come to you and said, you know, we have
10 patents which we think can prevent you from selling phones
11 with the Android operating system on it in the United States?

12 A No. They had talked about only ActiveSync patents. And
13 we were trying to have discussions about those, which is how
14 you synchronize your e-mail. But never a broader discussion
15 on the Android operating system.

16 Q Would that topic have been of some interest to Motorola if
17 it was committing itself to using Android on its handsets?

18 A Well, at the time -- I mean, we were separating -- the
19 business was separating from Motorola, we were splitting it
20 into two. So a larger percentage of our revenue was
21 dependent upon the Android operating system. So if, in
22 effect, we were going to get shut out of that market, that
23 would have been a very major decision of the CEO and the
24 board.

25 Q So except for this case, except for the Microsoft suing

1 Motorola, except for that, had you been involved in any
2 situations where Motorola had been sued by a major player in
3 the industry without having any negotiations beforehand about
4 the patents and what they covered?

5 A No. The practice in my industry -- I've done this for
6 20 years or so -- if it's another operating business, they
7 generally are fairly, you know, they're fairly open. We know
8 a lot of the people in the industry. We talk to them. They
9 come to us and say they have patents. And we spend, you
10 know, a year or two in an engagement to find a good
11 resolution to that.

12 Q So kind of walk us through how this typically takes place,
13 then. The custom and practice in the industry that you knew
14 about prior to October 1, 2010, when it came to how the
15 larger operating companies would operate if there were
16 disputes about that.

17 A Sure. So we would look at the marketplace and study who
18 had patents that are relevant to our business. We typically
19 understood that to be the other major handset manufacturers,
20 Samsung, Nokia, RIM. So we would engage in, how do we get
21 freedom of action? We have a lot of patents, Motorola has a
22 lot of patents that are relevant to their product business.
23 They have a lot of patents that are relevant to our business.
24 So you either send a letter saying, you know, we believe we
25 should have some discussions. Or you know someone, you've

1 seen them at a conference, you make a phone call and you say,
2 I'd like to -- you know, I think we should talk and talk
3 about IP issues between the companies.

4 And then there's typically going to be some people that
5 will get together, the head of licensing or a team of -- a
6 negotiation team which is made up of patent experts and
7 business people that understand the marketplace and how big
8 Samsung's product business is and how big Motorola's is
9 projected to be. Because analysts follow all this. So you
10 have a debate about everyone's patents. And it depends on
11 who you're talking to. Some people have more interest in
12 talking about patents than others. But those patent meetings
13 can go on for a very long time talking about -- somebody
14 explained yesterday, I think, claim charts.

15 Q Yes, could you -- that was mentioned yesterday. I'm going
16 to try to break this down into understandable bites instead
17 of a 30-minute speech if we can.

18 So in these typical negotiations, then, when one
19 company says another company might be infringing its patents,
20 you mention claim charts. So let's kind of explain what that
21 is.

22 A So claim charts, typically when you have a patent that's
23 granted, in the back of the patent there are claims, and
24 those claims outline your piece of property. Kind of like,
25 you know, this is the piece of property that I own. But it's

1 done in legal language and it's very complex, especially when
2 it's describing technical steps.

3 Then you have to map each element of those claims onto the
4 person's product or in some cases the person's use of a
5 standard. And you debate those. So someone explained it as
6 you may have four elements in a claim, A, B, C and D, that's
7 in your patent that you receive. And then you take elements
8 of the competitor's products and you map those, each of those
9 elements to the product and where they show up in their
10 product. And that's called a claim chart. And then you
11 share those with the other side.

12 And there's a back-and-forth debate about whether or not
13 the patent is valid. Is it really used? Maybe my product
14 doesn't really work the way you've illustrated it. So
15 there's a lot of back and forth how the patents really map to
16 the products.

17 Q Do you gain any information about -- from the other side
18 during these kind of negotiations?

19 A Sure. Because the other side is very motivated to show
20 you that your patents aren't really that great, or maybe that
21 they don't really need as much of the claim element -- you
22 know, they don't really need this, it's not as important to
23 their business. Or maybe they do things differently. Or
24 they will do things differently. They'll do a design-around
25 if that's appropriate. So you learn a lot about the value of

1 your patents through that engagement.

2 Q So when you have this engagement and you have the claim
3 charts, what kind of other issues are discussed in this
4 process that's sort of the custom and practice?

5 A With respect to the patents or other things?

6 Q The deal.

7 A Yeah. So then you have to look at, typically you look at
8 what their past sales were. So how many phones, for example,
9 have they sold over the past several years? And then how
10 many phones or widgets are they projected to sell over the
11 next term of the agreement? And when you talk about a term,
12 because people will -- some will be comfortable with five
13 years, some are comfortable with ten years. Some only want
14 no forward-looking license only covering the past, because
15 they're going to change all their products.

16 So, you have a lot of different complex terms that you
17 need to agree with the parties as to what they're comfortable
18 paying. You might say, you know, if the cumulative royalties
19 are too imbalanced, you'll agree to a cap. So the other
20 party won't have to pay any more than X.

21 Or you can carve out certain parts of the product so the
22 royalty base is smaller. So you have all those discussions.
23 It generally takes, you know, nine months to two years to put
24 a first agreement in place. And then it's shorter if it's
25 original.

1 Q Is that nine months to a couple years, is that timeframe
2 compacted if you're sued by someone trying to keep you out of
3 the market?

4 A Yes. So, I mean, if there's -- you know, if there's an
5 exclusion order being sought or something like that, you have
6 to react a lot more quickly. You have to scramble, really,
7 especially if you're not prepared with -- you haven't thought
8 about the company, you have to go look at your patents and
9 see how they relate to the company that you're going to talk
10 to. It's a complicated process. You need lawyers and
11 technologists to understand it.

12 Q You were asked questions on your examination concerning
13 the offer letter where you had the 20 days to respond to the
14 offer. Do you recall that?

15 A Yes.

16 Q And I think you said that since your deposition you recall
17 another letter that also had that sort of 20-day provision?

18 A Yeah. It's very common --

19 Q That's a yes or no, right there.

20 A Yes.

21 MR. PRICE: Your Honor, I'd like, if I may approach
22 the court and I'm handing to opposing counsel a copy of what
23 we've marked for identification as 7252.

24 THE COURT: You may approach.

25 Q Mr. Dailey, do you have Exhibit 7252 for identification in

1 front of you?

2 A I do, yes.

3 MR. PRITIKIN: Your Honor, we will have an objection
4 to this. I don't believe this document was on the exhibit
5 list.

6 MR. PRICE: That's correct. I'd be happy to address
7 that at side bar, Your Honor.

8 THE COURT: Why don't we leave this topic for the
9 time being and we'll take it up outside the presence of the
10 jury.

11 MR. PRICE: Very well.

12 Q Well, let me ask you generally then, sir, without
13 reference to the exhibit. Where have you seen such a
14 provision that you had 20 days to confirm whether or not a
15 company would accept an offer?

16 MR. PRITIKIN: Your Honor, I would have the same
17 objection. I don't think we should be getting into this
18 unless the document --

19 THE COURT: Let's wait until we get a chance to talk.
20 We'll break off at five minutes to three and talk about it
21 then.

22 Q Let me step back a little bit and try to lead you up to
23 October 1, 2010, and talk a little bit about you and a little
24 bit about the relationship with Microsoft.

25 First, I heard and already knew, obviously, that you're

1 both a lawyer and an engineer?

2 A Right.

3 Q So which profession did you start out first in?

4 A So, I joined Motorola in 1989 as an electrical engineer.

5 Q And what happened that you joined the dark side? When did
6 you become a lawyer?

7 A So I did engineering for about a year and-a-half. And
8 then I moved into the patent department where we wrote
9 patents and licensed patents to -- at that time we were
10 licensing a lot in Japan. And then I went to night school
11 for law school until 1994. I graduated in 1994.

12 Q I think you joined the patent department when?

13 A The end of 1990.

14 Q Between 1990 and the time you graduated from law school,
15 were you involved at all in patent negotiations?

16 A I did a lot of patent licensing in Japan. I wrote a lot
17 of patent applications as well.

18 In fact, I recall flying home on a plane from Tokyo
19 writing my final exam for one of my classes. So it was an
20 interesting time.

21 Q So why did you take the effort to go to law school to get
22 the law degree? How did that help you in your work?

23 A I was very interested -- once I started working in patents
24 I found it to be very interesting. And I wanted to become a
25 lawyer so I could do licensing and other types of

1 engagements, learn about the law.

2 Q After you graduated, did you use that combined knowledge
3 to continue at Motorola working in negotiations or licensing?

4 A I did. I worked in different capacities. I moved to
5 London for a couple of years. I lived in Boston for a couple
6 of years managing intellectual property issues for different
7 business units.

8 Then in 2000 I came back to focus on the mobile device
9 business.

10 Q So 2000. Then you're in the United States. What city are
11 you in?

12 A I work outside of Chicago in Libertyville.

13 Q You said that at that time you focused on cellular?

14 A It was a cellular phone or the mobile device business.

15 Q Could you tell us, then, how long were you or have you
16 been in that?

17 A Since 2000 I've been with the mobile -- or I was with the
18 mobile device business until I more recently moved to Google.

19 Q When was it that you "Moved to Google."

20 A September of 2012.

21 Q That's because at that point Google had a transaction with
22 Motorola, right?

23 A Right. They had completed the acquisition of us.

24 Q So, in the cellular mobile area when you were at Motorola
25 up until 2012, did there come a time when you started

1 focusing very much on licensing?

2 A Yes. So from the 2000 to 2006 timeframe, I wasn't focused
3 on patent licensing, it was more strategic relationships,
4 software licenses, and things of that nature.

5 In 2006 I moved out of the law department, actually, to
6 take a role in strategy to manage the "patent business" we
7 called it. But really managing freedom of action for our
8 business so we could build the products that we wanted to
9 build.

10 Q Can you tell us what you mean by that when you say your
11 goal was to kind of manage this freedom of action?

12 A Our goals were to look at kind of the world and identify
13 relevant patent holders, and then understand how we could
14 engage with them and negotiate freedom of action or
15 cross-license deals so we could all build products.

16 And there was obviously money that would flow in one
17 direction or the other, depending on who built more products
18 and who had better patents. But that was the goal.

19 Q So why was it necessary to deal with other companies so
20 that you could have freedom of action?

21 A Because we don't own all the patents that we need in order
22 to build our equipment, and either do they. There's a lot of
23 patents in the world. And in order to build a product, in
24 many cases you need a license from other people that hold
25 those patents.

1 Q So the idea was to meet with companies so there could be
2 some arrangement where you can both operate and be
3 competitive?

4 THE COURT: Mr. Price, watch your leading on this.

5 A Yeah. Sure. So we did. We got together and negotiated
6 licenses that allowed both companies to operate.

7 Q What kind of companies are we talking about that you had
8 these negotiations with?

9 A So a lot of them were -- a majority of them were in the
10 mobile space, competitors of ours, direct competitors of
11 ours. Hardware manufacturers like Nokia, Samsung, RIM or
12 Blackberry. And there are also other ones from time to time
13 like Kodak, or something.

14 Q Now, before getting more current on your experience with
15 those licensing negotiations, I want to talk to you about
16 your experience with Microsoft in the 2000 - 2010 timeframe.

17 A Sure.

18 Q Now, did there come a time -- well, let me ask you this.
19 In the 2000 - 2010 timeframe, did Motorola use some of
20 Microsoft's intellectual property?

21 A Yes. We had, in the mobile space we're talking about, we
22 had an early -- we were an early adopter of the ActiveSync
23 technology in 2003. We had struck a deal, a four-year deal
24 for \$100,000 to use Microsoft's ActiveSync technology. And
25 along with that came a patent license. But it wasn't really

1 part of the deal.

2 We also --

3 Q Can you tell us what the ActiveSync thing is?

4 A ActiveSync is the technology, it's a protocol as to how
5 you get your e-mail on your smartphone. So how do you get it
6 out of the Exchange server? And so you get the same kind of
7 mirror image of what you would normally get on your computer,
8 on your smartphone. So it was the syncing of the e-mail
9 technology.

10 Q Why was Motorola an early adopter of that from Microsoft?

11 A I don't recall all the reasoning. But we wanted to have a
12 compelling product. And providing e-mail on a phone in the
13 2003 or 2004 timeframe was a pretty novel idea.

14 Q Was this agreement with Microsoft a pure patent license,
15 or what kind of agreement was it?

16 A No. It was a technology license, because Microsoft had,
17 you know, they had their servers that they sold. So most
18 people were using Microsoft for their e-mail.

19 And so it was the protocol or technology related to
20 accessing that server remotely with your handset.

21 Q Now, you said at some point this agreement expired?

22 A It expired in 2007.

23 Q What happened in 2007 after that agreement expired with
24 Microsoft with respect to this ActiveSync stuff?

25 A So we started renegotiation of the ActiveSync license. It

1 was no longer \$100,000, it was now per-unit royalties
2 associated with it. And we negotiated all the way through
3 the end of 2007. And we sent, sometime in December,
4 December 27th I would say, what we believed to be the final
5 agreement. We were willing to sign it. We were going
6 through the approval process and we asked Microsoft to sign
7 it and send it to us so we could then execute that agreement.

8 Q So what happened after that point?

9 A It was a little bit strange, but they didn't respond right
10 away. And then there was -- and I don't know the details of
11 it, but Microsoft had a settlement with the European
12 government. And don't quote me on that. But they then made
13 the specification, the technology, available for free, except
14 for the patents.

15 So, instead of needing a license with Microsoft for the
16 technology, that was available and you could build your
17 products. But then in --

18 MR. PRITIKIN: Your Honor, may we see you at side
19 bar?

20 THE COURT: Yes.

21 (Court and counsel met at side bar as follows:)

22 THE COURT: I was wondering how long it would take to
23 get an objection.

24 MR. PRITIKIN: We're getting into the motion in
25 limine. If they want to talk about the fact that they

1 couldn't reach an agreement on the renegotiation, fine. But
2 now he's injected -- I mean, it was pretty subtle. But it
3 was the European antitrust authority.

4 MR. PRICE: I agree to a motion to strike that. That
5 was not the intended response. It switched from the business
6 to the patent, and I don't think they got it.

7 THE COURT: I'm afraid what they heard was not what
8 they were supposed to hear.

9 MR. PRITIKIN: We need to short-circuit some of this.
10 I understand the point, and it is fair for them to make the
11 point that they weren't negotiating --

12 THE COURT: Are you going to move on? What is your
13 next question?

14 MR. PRICE: And my next question is here's an e-mail
15 that you reached out to them trying to get a resolution on
16 this.

17 (The side bar concluded.)

18 THE COURT: Ladies and gentlemen, one of the
19 challenges of this is we start with a very big world and we
20 try and narrow it down to the issues that are going to be in
21 this lawsuit. Part of that is a process of something called
22 motions in limine in which both sides have suggested areas
23 that we not talk about and I go through and sort those all
24 out. The witness has inadvertently wandered into one of
25 those areas. So I'm going to ask you to strike from your

1 memory -- since we seem to talk about memory around here a
2 lot -- strike from your memory the testimony in regards to
3 what was happening in Europe and the rest of that
4 speculation.

5 And Mr. Price is going to ask a fresh question.

6 Q So, Mr. Dailey, the negotiations changed from -- I'm going
7 to lead just a second here Your Honor to proceed smoothly,
8 hopefully -- led from this discussion for a business sort of
9 technology-arrangement to a patent-arrangement?

10 A Yes.

11 Q And in doing that, what happened in the discussions
12 between Microsoft and Motorola?

13 A Later in 2008, I think it was April/May timeframe,
14 Microsoft sent a pure patent license for us to sign. And so
15 our response was we would like to understand what patents
16 Microsoft had relative to this ActiveSync specification. So
17 we requested claim charts, like we request from everyone else
18 that we negotiate a patent license with.

19 And they didn't respond for a very long time with the
20 claim charts. At some point they sent some patent numbers.
21 Then finally in November of 2009 they sent the claim charts.
22 But that was well more than a year after we had asked for
23 them.

24 Q Were you in any way miffed or upset or anything with
25 Microsoft because of this that took awhile?

1 A No. I assumed it wasn't that important to them, or if it
2 was they would have contacted us.

3 Q So after you got the claim charts, we're talking the
4 2009/2010 timeframe, any other contacts with Microsoft about
5 business issues including this ActiveSync?

6 A Yes. So, late in 2009 we started getting notices that
7 they believed our Android products were using ActiveSync and
8 we didn't have a license. So we kept responding with, we
9 needed the claim charts, which came in late, late 2009. Then
10 in January of 2010 we spent some time to review those
11 patents. 2010 we get on the phone with, I believe it was Joy
12 Murray, their licensing executive, and asked if we could have
13 a negotiation to talk about -- that's broader than just
14 taking a one-way license from Microsoft. And she said she
15 didn't have the authority to do that. So I asked her to ask
16 her management, you know, if we could have a broader
17 discussion, because Motorola had some patents that were
18 relevant to wireless e-mail. We'd actually done wireless
19 e-mail in the 2000 timeframe in our paging business. So we
20 knew we had patents that were relevant to, we believed,
21 relevant to Microsoft's stuff. So we wanted to have a
22 broader discussion.

23 Q And, by the way, this wireless e-mail patent that you're
24 talking about, or patents, did these have anything to do with
25 the standards-essential patent?

1 A You know, I think that's been debated, but we don't
2 believe ours were a standard. But whether or not ActiveSync
3 is a standard is a different issue.

4 Q I meant the ones that you had --

5 A No, they were not related to standard.

6 Q So this wasn't one of the patents that had anything to do
7 with those October 2010 letters?

8 A That's correct.

9 Q And before we get on any further, if we can just have you
10 look at Exhibit 7239. Could you tell us what that is?

11 A That's the e-mail from Joy Murray, November 12, 2009, with
12 the claim charts attached.

13 MR. PRICE: Your Honor, we move Exhibit 7239 into
14 evidence.

15 MR. PRITIKIN: No objection.

16 THE COURT: Counsel, I don't have anything attached
17 to my copy of this exhibit. Is there supposed to be more
18 than three pages?

19 MR. PRICE: This exhibit is just three pages, Your
20 Honor. There's another string which it refers to which is a
21 separate exhibit.

22 THE COURT: The three-page Exhibit 7239 is admitted
23 and may be published.

24 (Exhibit No. 7239 was admitted into evidence.)

25 Q If we can just look at the bottom of the first page.

1 There's an e-mail from you to Joy Murray. She was with
2 Microsoft?

3 A Yes. She was their director of licensing.

4 Q This is November 4, 2009. Do you see that?

5 A Yes.

6 Q At the bottom of that first paragraph you see it talks
7 about, "Please review Mansour's e-mail dated October 2, 2008
8 in this regard." Do you see that?

9 A Yes.

10 Q And the sentence above that talks about the claim charts?

11 A Yes.

12 Q How does this relate to what you told us so far about your
13 communications with Microsoft?

14 A So we were expecting -- we had requested claim charts so
15 that we could engage in understanding the relevance of the
16 Microsoft patents to our products. And they eventually sent
17 us some patents, I believe earlier in 2008, but they never
18 sent any claim charts. So we were asking for the claim
19 charts to figure out how these patents related to the
20 products.

21 Q And the reference there to Mansour's e-mail dated
22 October 2, 2008, if you could look at what's been marked as
23 Exhibit 7240.

24 A Yes.

25 Q And is Exhibit 7240, is this the e-mail string that you

1 were referring to when you said, "Please review Mansour's
2 e-mail dated October 2, 2008?"

3 A Yes, that's correct.

4 MR. PRICE: Your Honor, I move Exhibit 7240 into
5 evidence.

6 MR. PRITIKIN: No objection.

7 THE COURT: 7240 is admitted and may be published.

8 (Exhibit No. 7240 was admitted into evidence.)

9 Q And if we can just blow up -- we'll start at the bottom
10 where there's October 2, 2008. That's an e-mail from
11 Ms. Murray actually to Mr. Mansour. Do you see that?

12 A Yes.

13 Q And if you go to the next page, and in the middle of that
14 page there actually -- Ms. Murray says, "Thanks for your
15 patience." Do you see that?

16 A Yes.

17 Q If you look at the middle of that paragraph it says, "Our
18 patent attorney was kind enough to provide me with the
19 attached information that is applicable for a client
20 implementation." Do you see that?

21 A Yes.

22 Q And that was in response, was it not, if you look at the
23 e-mail right before that, October 2, 2008, from Mr. Mansour.
24 "Thanks, Joy. I have forwarded the list to our team. You
25 were also going to give me the name of the patent attorney

1 with whom we could talk about these patents and provide us
2 with claim charts." Do you see that?

3 A Yes.

4 Q That's the request you were referring to?

5 A Yes.

6 Q So if we go back from the 2008 timeframe to the
7 November 2009 timeframe --

8 THE COURT: This may be a good time to take a break.

9 MR. PRICE: May I ask just two, perhaps two or three
10 quick questions on 7239? I hope it won't take more than a
11 minute.

12 Q Exhibit 7239, this is the 2009 communication. You see at
13 the bottom of the second page there there is an e-mail from
14 Ms. Murray saying, "We recently saw in the press your new
15 Android device will connect to Exchange. I'm curious if you
16 have implemented Exchange ActiveSync, and if so, under what
17 license would you would be operating under." Do you see
18 that?

19 A Yes.

20 Q Is this what sort of kicked off the discussions again
21 between Microsoft and Motorola about these ActiveSync
22 patents?

23 A Yes.

24 Q What is that referring to in October of 2009 when it talks
25 about the press, with respect to your new Android?

1 A There was a lot of press, at least in my world, around the
2 Droid phone we were going to make available for Verizon that
3 used the Android operating system.

4 Q Very quickly. Prior to this timeframe, had Motorola been
5 using Windows operating systems in its phones?

6 A It had, yes.

7 THE COURT: Ladies and gentlemen, I'm going to let
8 you out for your break and we're going to take up a matter of
9 an exhibit. We're going to come back out at ten minutes
10 after three, and at that point we will have fully made up our
11 time this morning. So that wasn't much of a problem. But
12 I'm sure all of you will remember and take heed in how
13 difficult it is to get here tomorrow. Hard break at 4:30.
14 Thank you for your patience here.

15 (The following occurred outside the presence of the jury.)

16 THE COURT: All right. Mr. Price, 7252, you're going
17 to explain to me why this should be admitted.

18 MR. PRICE: Yes. Your Honor, it's a letter from
19 Microsoft to Mr. Dailey concerning a Microsoft offer to grant
20 Motorola Mobility patents dated August 1, 2011. It's part of
21 these overall negotiations taking place during that
22 timeframe. And the reason to admit it is that Mr. Dailey had
23 been asked previously, "Do you know of any other letter that
24 had a 20-day timeframe." And his deposition says, "I can't
25 recall one." Well, this is actually one that he received

1 from Microsoft which says at the bottom, "Microsoft will
2 leave this offer open for 20 days. Please confirm whether
3 MMI accepts the offer." So it's evidence going to whether or
4 not there's anything nefarious, unusual, or sinister about
5 leaving an offer open for 20 days.

6 THE COURT: H.264 patent license. It sounds an awful
7 lot like this lawsuit.

8 MR. PRICE: It is Microsoft offering to license to
9 Motorola H.264.

10 THE COURT: Doesn't it also say "reciprocity"?

11 MR. PRICE: Yes. There's no question this is
12 relevant to this lawsuit.

13 THE COURT: Not only relevant but it sounds like it's
14 involving settlement negotiations.

15 MR. PRICE: It involves -- you either say
16 business-settlement negotiations or litigation-settlement. I
17 don't know which one you characterize this as, because they
18 got really kind of merged at this time.

19 THE COURT: If I remember, we had a motion in limine
20 on this precise subject and that's exactly what I said, it
21 was hard to tell one from the other on occasion.

22 MR. PRICE: Yes.

23 THE COURT: Okay. I'll hear from Mr. Pritikin. And
24 this is not on your exhibit list.

25 MR. PRICE: I don't know if it was amended. It is

1 not. We amended last night to put it on.

2 MR. PRITIKIN: Yes, Your Honor, it was not on the
3 exhibit list. And point of fact, the question that Mr.
4 Dailey was asked was whether Motorola had ever sent out a
5 letter of the kind that he had sent to Microsoft. It was not
6 a general question whether he had ever seen one. The
7 question was whether he had ever sent it. This letter is on
8 terms that are RAND, very close to RAND. It is very
9 different. It would be confusing and prejudicial to the jury
10 to have it come in. Because what they want to argue is that
11 by saying that the offer is going to be open for 20 days, and
12 so forth, that this somehow validates what they did. And
13 it's entirely different.

14 This is an offer that is made on terms. There's no
15 argument that this did not comply with RAND, what was being
16 offered here. It's a very, very different type of letter.
17 And, as I said, it's confusing and prejudicial.

18 THE COURT: What is the second sentence or the second
19 line of the letter says, "A worldwide non-exclusive license
20 under Microsoft's portfolio patents and pending applications
21 covering the subject matter of ITU-T recommendation H.264."
22 What's that?

23 MR. PRITIKIN: I'm assuming it is Microsoft's
24 standards-essential patents on H.264, Your Honor.

25 THE COURT: Well, ITU-T. So International

1 Telecommunications Union?

2 MR. PRITIKIN: That's the standards-setting
3 organization.

4 THE COURT: That's what I want to know, if that's
5 what this is referring to.

6 MR. PRICE: Yes, it is, Your Honor. It's not on the
7 exhibit list that was produced. We have been amending the
8 exhibit list, both parties, every night. And we had not put
9 this on. There's no question as to the authenticity. There
10 is no surprise, because the parties have talked about these
11 discussions going forward with reciprocity. And I wasn't
12 planning on getting Mr. Dailey to testify about the specific
13 terms, but just to show that this is the type of letter you
14 get when you're in negotiations, that there's nothing unusual
15 about leaving an offer open for 20 days. They made a huge
16 deal out of this.

17 MR. PRITIKIN: Your Honor, I would take issue with
18 the statement that both sides have been changing the exhibit
19 list. The exhibit list was filed on Friday. They've been
20 doing a lot. I don't think we have been.

21 THE COURT: The pot and the kettle shouldn't be
22 calling each other black.

23 Counsel, I'm going to admit it with paragraphs 2, 3 and 4
24 redacted . I think the point you want to make is that this
25 letter has been sent.

1 MR. PRITIKIN: If it's going to be admitted, I think
2 the whole document should go into evidence, then. Then it's
3 even more misleading as to what it is. I think it's quite
4 important, if it's going to go into evidence, that it all be
5 there.

6 THE COURT: All right. Well, then, we'll admit the
7 whole thing. We'll be in recess.

8 (The proceedings recessed.)

9 THE COURT: Mr. Price.

10 MR. PRICE: I have a relatively smaller timeline, but
11 one I would like to put up. May I?

12 THE COURT: That's fine. "Smaller" meaning smaller
13 period, or smaller board?

14 MR. PRICE: Smaller board, fewer entries, I think.

15 THE COURT: Ladies and gentlemen, this is another
16 demonstrative. They will never be able to read it, unless
17 you move it closer.

18 MR. PRICE: Every now and then I will have a document
19 on the screen.

20 THE COURT: You will need to have it close. Because
21 every now and then they will trade documents.

22 MR. PRICE: Is that okay?

23 By Mr. Price:

24 Q Mr. Dailey, we put up a timeline that was used in opening.
25 I want to again, as Microsoft counsel did, put things

1 chronologically. The first entry here says, "November 2009
2 Motorola releases Droid phones." Is that about the timeframe
3 that Motorola released its Droid phones?

4 A It is, yes.

5 Q And we were talking about Exhibit 7239. You can put that
6 up on the screen again. If we look at the top part, you see
7 in November of 2009 Ms. Murray sends an e-mail which includes
8 the first thing, "Per your request I have attached three
9 claim charts for the exchange ActiveSync specification." Do
10 you see that?

11 A Yes.

12 Q I want to get the timeframe now. You are getting this
13 e-mail in November of 2009, about the time the Droid comes
14 out. What happened after this, after Ms. Murray sent you the
15 three claim charts?

16 A So we had -- we had some lawyers and patent people review
17 the claim charts, and then we were -- we scheduled a phone
18 call with Joy Murray in January of 2010 to discuss a license
19 agreement that would -- that maybe was broader than they were
20 suggesting, because we had patents that we believed were
21 relevant to the ActiveSync protocol as well. So we wanted to
22 talk about a cross-license patent arrangement with Joy
23 Murray.

24 Q The patents you are talking about are not
25 standards-essential patents, right?

1 A No, they are nonSEPs.

2 Q And what exactly did Motorola's nonSEPs involve that you
3 wanted to talk about?

4 A They were of similar technology as the ActiveSync. They
5 were about synchronizing wireless e-mail -- e-mail over
6 wireless communication. Several years ago we had
7 developed -- we had pagers a long time ago, and we developed
8 two-way paging over a wireless, and it allowed you to access
9 e-mail as well.

10 Q And so when you had this phone call with Ms. Murray, what
11 did she say?

12 A She said she didn't have authorization to have a broader
13 discussion. They had sent us a standard patent license
14 agreement, and that's all she was authorized to do. So I
15 asked her to speak to her management to see if we could have
16 a broader patent discussion.

17 Q And so what happened at that point?

18 A Well, I didn't have any further communication with Joy
19 Murray. I think things kind of got quiet. And then in May
20 of 2010 I was given an opportunity to speak on a panel, and
21 one of the members of the panel was from Microsoft's legal
22 department. So I actually agreed to speak at George
23 Washington University. I believe the guy's name was Jeff
24 Rank. He was at Microsoft. I was on a panel with him, so we
25 spent a day talking. I arranged to have a meeting with Brad

1 Smith and Horacio. I used Jeff as a conduit to set up a
2 meeting so we could talk about our relationship with
3 Microsoft from a legal perspective.

4 Q Was this in any way a hostile or adverse discussion that
5 you had at this conference that you went to?

6 A No, not at all. We were on the same panel. I can't
7 remember the topic of the panel, but the whole idea was to --
8 I wanted to meet Microsoft, and we wanted to build a closer
9 relationship with them from a legal perspective. We were
10 about to spin -- separate out our company from Motorola, so
11 we wanted to make sure we had relationships with the right
12 people.

13 Q Now, when you say you were about to spin off your company
14 from Motorola, can you explain what you mean by that?

15 A Sure. In January of 2011 Motorola had different business
16 units, and they decided to separate the businesses into two
17 companies. And so the mobile device business, which is the
18 cellular phone business, and the video set-top box cable
19 business were separated from the rest of Motorola. And we
20 created our own company called Motorola Mobility, Inc. And
21 that was in January of 2011.

22 Q And Motorola Mobility, Inc. is one of the defendants here?

23 A Yes.

24 Q And why then did you want to have these conversations with
25 Microsoft in lieu of that -- in connection?

1 A Well, we just thought -- we kind of thought about -- in
2 some of our meetings we thought we should reach out and meet
3 some of the people in our industry, and Microsoft was in our
4 industry. We had this ActiveSync issue that we knew was an
5 issue. And so when I spoke with Horacio about an agenda for
6 that meeting, we talked that we should talk about IP issues.
7 It was on the agenda.

8 Q And by "Horacio," could you tell us who you are talking
9 about?

10 A Sure. Horacio Gutierrez is the head of -- I don't know
11 his exact title, but the head of licensing, my counterpart at
12 Microsoft, that I have been talking to about settling a
13 cross-license arrangement over the last several years.

14 Q So did you eventually come to an agreement that everybody
15 was going to get together and talk about this stuff?

16 A Yeah, they were very open to it. We originally scheduled
17 it for August. But due to people's schedules it got pushed
18 out until the October timeframe, and it was actually October
19 22nd when it was scheduled for us to meet.

20 MR. PRICE: May I approach?

21 THE COURT: Yes.

22 By Mr. Price:

23 Q We didn't think ahead here, so we didn't put this on here.
24 But sometime before October 1st then you had a meeting
25 scheduled --

1 A Yes.

2 Q -- with Microsoft? On October 22nd?

3 A Yes.

4 Q Where was this meeting going to take place, some
5 neutral --

6 A It was in Microsoft's -- it was in Redmond, here in the
7 Seattle area, at one of their large conference places.

8 Q Now, in the discussions that you had to set up the October
9 22nd meeting, or any meeting prior to that, did Microsoft
10 ever tell you that they had patents, other than the
11 ActiveSync patents, that would cover the Android software
12 that Motorola was putting on its phones?

13 A No, we hadn't had any discussion like that. They had
14 never sent me any claim charts or anything like that.

15 Q Did you -- Prior to October 1st, 2010, had Microsoft ever
16 told you that they were going to sue Motorola?

17 A No.

18 Q And asked for an order that Motorola could not sell its
19 Android phones in the United States?

20 A No, we were very surprised by the lawsuit of October 1st.

21 Q Prior to October 1st, 2010, had Motorola gone to Microsoft
22 and offered its standards-essential patents to Microsoft?

23 A No, we had not.

24 Q Prior to that timeframe, had Microsoft -- prior to
25 October 1st, 2010, had Microsoft asked Motorola to put its

1 patents on the table?

2 A No.

3 Q I want to then draw your attention to October 1st of 2010.
4 First, let me ask you, do you recall what day of the week
5 that was?

6 A It was a Friday.

7 Q And at that time, October 1st, 2010, did you learn
8 anything about whether Microsoft had taken any action against
9 Motorola?

10 A We did. That's the day we learned that they filed at
11 least the ITC complaint, and then there was also district
12 court cases that were filed.

13 Q Now, those lawsuits, did those lawsuits concern just a few
14 ActiveSync patents?

15 A No, they were addressing the use of the Android operating
16 system on our phones. So they were trying to exclude
17 basically most -- a large percentage of Motorola's revenue
18 from the market by excluding us from the U.S., and being able
19 to import Android -- the Droid phones from the U.S. market.

20 Q Prior to October 1st, 2010, did you feel any significant
21 time pressure in connection with your discussions that you
22 had been having with Microsoft?

23 THE COURT: Mr. Price, that is leading.

24 By Mr. Price:

25 Q What kind of time pressure did you have with respect to

1 negotiations with Microsoft prior to October 1st?

2 A There wasn't a lot. We had had the communications on
3 ActiveSync. So I took an initiative and set up a meeting
4 with the general counsel and Horacio. We thought we would
5 have a normal engagement, which is, if there were big IP
6 issues we would talk about them, they would send us claim
7 charts, we would send them some patents. As I spoke before,
8 it takes a year or so to conclude one of those licensing
9 deals in my experience.

10 Q Let me ask you, in your examination by Microsoft you were
11 asked about an investigation that Motorola did in the October
12 timeframe, before it sent out the October 21st and
13 October 29th letters. Do you recall that?

14 A Yes.

15 Q Now, in your experience, what was the custom and practice
16 as to how long Motorola would have had for such an
17 investigation in the normal course of its dealings with
18 companies asserting patent claims?

19 A It would take a couple of months, depending on people's
20 schedules, to review patents, that you could -- you know, the
21 claim charts and patents related to our patents. We had to
22 find technicians that could speak about the functionality of
23 our products. It took several months to have those under
24 normal circumstances.

25 Q Let me call your attention now back to October 1st, 2010.

1 When you heard that you had been sued by Microsoft, what was
2 your reaction?

3 A I was shocked. I was upset actually, because we were
4 trying -- we were setting up to spin Motorola out, and there
5 was a lot of work related to that from the legal perspective,
6 and I had taken the proactive move to set up a meeting so we
7 could discuss IP issues in October. I was very shocked that
8 they took the step of suing before talking with Motorola.

9 Q On October 1st of 2010, did you hear from anyone at
10 Microsoft?

11 A Yeah, I received a note from Horacio that he wanted to
12 speak to me, an e-mail. I called Horacio and we spoke
13 briefly on Friday afternoon.

14 Q Could you tell us what was said during the phone
15 conversation you had on Friday afternoon?

16 A Sure. There were -- It wasn't the only conversation.
17 There were several other conversations between Brad Smith and
18 Scott Offer, and -- between the CEOs and Balmer. And the
19 theme was: Don't worry about the lawsuit. We want you to
20 put your patents on the table. We would like to resolve this
21 quickly. Don't be concerned about this. We really still
22 want to have this meeting on October 22nd. We want you to
23 come to Seattle and have that meeting.

24 It was a little bit odd to say not to worry about the
25 threat of an injunction on most of our products in the U.S.,

1 but that was the message that I received.

2 Q Well, after you received that phone call from Mr. -- from
3 Horacio, Mr. Gutierrez, what was kind of on your plate from
4 that point going forward in October, from that point until
5 the time the October 22nd meeting was to take place?

6 A We had to figure out if we were going to go to the
7 meeting, whether it made sense to go to the meeting, what we
8 should do. So we were really trying to figure out how do we
9 find a resolution to this. And we kind of had to -- we had
10 to believe, you know, that we could put the litigation aside
11 and go meet with them on October 22nd, and that's what we
12 did, to find out really what Microsoft was looking for.

13 Q If you look at the time chart here, we've got on
14 October 1st Microsoft suing here in Seattle, the Western
15 District of Washington, and the ITC. And, by the way, I
16 think you were asked this, what is the only remedy you can
17 get at the International Trade Commission?

18 A It is an exclusion order. So there is no money damages
19 available. That's right -- Sorry. Ignore me.

20 Q What effect would an exclusion order have been on
21 Motorola's business, preventing Motorola from basically using
22 Android software on its phones?

23 A My understanding is that we wouldn't be able to import
24 phones using the Android operating system into the U.S. It
25 was traumatic. It was what we were counting on to rebuild

1 our business in 2010/2011.

2 Q Would it have been easy for Motorola to switch to the
3 Windows operating system?

4 A No. We had actually made a conscious effort -- Motorola
5 had struggled for several years. So we had a new CEO that
6 came in and streamlined, made decisions about products that
7 we could build and put what development dollars we had left
8 on Android for the mobile business. So we had gotten rid of
9 our Symbian-based products, and we didn't renew the
10 Microsoft-based products, and we kind of bet on Android. We
11 had bet on the new operating system with the hopes that it
12 could revive our company.

13 Q And if we look at the time chart here, you see it says
14 October 11, 2010, Microsoft unveils Windows Phone 7. Do you
15 have any knowledge about that, about whether or not the
16 Windows Phone 7 was unveiled around that time?

17 A It was unveiled in October. There was a lot of press as
18 well after the lawsuit. I just read it the other -- Steve
19 Balmer was saying, Android is not free, there is going to be
20 a tax. It was very clear that there was going to be -- it
21 was kind of a marketing thing that Android wasn't free, by
22 suing Motorola.

23 Q So let's focus then on this October 1st to, let's say, to
24 October 21st timeframe. In going through, looking --

25 Let me step back a bit. Are you aware of whether or

1 not there was an expectation in the industry that if you get
2 sued -- companies of this size get sued on patents, whether
3 or not there is going to be another lawsuit on patents --

4 MR. PRITIKIN: We would object to that, your Honor.
5 Foundation grounds.

6 THE COURT: I will sustain that objection. Lay some
7 foundation.

8 MR. PRICE: Let me lay some foundation.
9 By Mr. Price:

10 Q Were you familiar with the lawsuits in this industry, the
11 cellular mobile industry, where large companies had sued
12 large companies claiming patent infringement?

13 A Yes.

14 MR. PRITIKIN: The same objection, your Honor.

15 THE COURT: I will overrule it.

16 By Mr. Price:

17 Q And do you recall a number of times you had seen that
18 happen, or how many times Motorola had been involved?

19 THE COURT: You have two different questions.

20 By Mr. Price:

21 Q Do you recall how many times you had seen that happen,
22 including Motorola being involved?

23 A I don't recall how many times, but certainly whenever
24 there is major litigation between two operating companies,
25 there is lawsuits going in one direction, there is

1 counter-lawsuits coming back, in my experience in the mobile
2 space, at a minimum. At that time there were lawsuits
3 between Nokia and Apple, and HTC and Apple as well. They
4 were going in both directions.

5 Q As someone who has been negotiating licenses and
6 cross-licensing agreements, do you know why that was the
7 pattern, that if one operating company sued another there
8 would be the expectation of there being a lawsuit back?

9 MR. PRITIKIN: Foundation, your Honor.

10 THE COURT: I will allow him to testify as to his
11 opinion or understanding why.

12 By Mr. Price:

13 Q What was your understanding?

14 A From my perspective, it helped. If you can't resolve
15 through negotiations, which is what we prefer, then you
16 resort to litigation. And then you can have -- litigation
17 comes into play as far as how you find a reasonable
18 settlement between the two parties. If you can't agree among
19 yourselves, you can mediate or you can end up in litigation.

20 Q If in the negotiation Microsoft had come to you and said,
21 we have these patents that we think you infringed, what would
22 have been your customary response to that?

23 MR. PRITIKIN: Objection.

24 THE COURT: Sustained. Speculation, counsel.

25 By Mr. Price:

1 Q Let me ask it this way: If an operating company came to
2 Motorola saying that they had patents that read on, that
3 covered Motorola's technology, did Motorola have a custom and
4 practice as to what it would do in response to such an offer?

5 A Sure. We would study our patent portfolio and figure out
6 if we had any patents that were relevant to the business that
7 was making those accusations.

8 Q And why would you do that?

9 A So that you can negotiate a fair deal, so that you don't
10 have to take the first offer made by the other company. You
11 find leverage you have at the negotiating table against that
12 company, and you counteract or counterbalance the leverage
13 that they have against you, and then you hopefully resolve in
14 an amicable settlement.

15 Q When Mr. Gutierrez talked to you on October 1st, did he
16 tell you why he wanted Motorola to put its patents on the
17 table in response to Microsoft suing Motorola?

18 A No. It was more -- he wanted to put them on the table so
19 that we could have a negotiation and settle this quickly.

20 Q Did you do anything to try to do what Mr. Gutierrez
21 requested that you do, which is to put some patents on the
22 table?

23 A Yeah. I didn't personally do it, but we had our engineers
24 and lawyers look through our patent portfolio to find patents
25 that were relevant to Microsoft. And we sent those two

1 letters that we have talked about today.

2 Q Let's look at one of those letters, if we can. Let's go
3 to what has already been marked, I believe, as Exhibit -- We
4 will start with Exhibit 1. That's a nice one to start with.

5 Now, with respect to this letter, you were asked I
6 think in your examination whether or not you expected
7 Microsoft to accept the terms of this letter. Do you recall
8 that question?

9 A Yes.

10 Q I think you said the answer was "no," right?

11 A I expected a response, I think was my answer.

12 Q Why wouldn't you have expected -- Let me step back. In
13 your custom and practice in negotiations, was it the custom
14 and practice that the other side would immediately accept the
15 first offer you made?

16 MR. PRITIKIN: Objection, your Honor.

17 THE COURT: I will permit the question.

18 THE WITNESS: My standard practice, no --

19 THE COURT: You were asked custom and practice, not
20 your practice, I believe was the question.

21 THE WITNESS: Could you read the question back to me?

22 THE COURT: Why don't we start with a fresh question?
23 I think your question -- You started off with "in the
24 industry" and then "your practice."

25 By Mr. Price:

1 Q Let's clarify. As someone who is the head -- involved in
2 licensing at Motorola, did you have an understanding as to
3 what the custom and practice was in the industry as to
4 whether or not a first offer was routinely accepted without a
5 counter-offer?

6 MR. PRITIKIN: Your Honor, foundation.

7 THE COURT: Overruled.

8 THE WITNESS: My experience, these negotiations take
9 a long period of time. I have never known a first offer to
10 be accepted. There is always back and forth about what is
11 appropriate. This offer letter didn't have all of the
12 necessary terms. You know, you would have to discuss the
13 length of the license, you know, negotiate a lot of the other
14 terms and negotiate the rate. And they would probably put
15 their patents on the table with respect to at least the
16 standards that we were offering the license to.

17 By Mr. Price:

18 Q What expectation did you have as to whether or not -- Let
19 me step back, because you have testified about that. What
20 expectation did you have about the type of negotiations that
21 would occur between Microsoft and Motorola after you sent out
22 an opening offer?

23 A My experience is people look for patent peace. You want
24 to have an engagement with a company -- You want to really
25 do it with it once. You don't want to have to come back time

1 and time again. Generally speaking, we negotiate patent
2 license agreements that allow you to know that you're -- that
3 this is the agreement. The relationship between the two
4 companies is understood with one agreement, at least for a
5 period of time. That is a broad patent peace agreement.

6 Q And in your experience, when patent negotiations started
7 out with just like an offer on a subset of patents, what
8 would happen with respect to the scope of that agreement
9 during negotiations?

10 A It would expand in scope in most cases. You want to know
11 that there aren't any other issues, that you aren't going to
12 see different patents. If I agree to licenses, you know, you
13 want to understand that there is peace between the companies.

14 Q And what kind of issues would you expect then to come up
15 in the negotiations after you sent out an initial offer?

16 A It is hard to predict. Every company is a little bit
17 different as to what issues they would bring up. They have
18 their own issues about whether the patents are valued, how
19 are they valued in their products; maybe I don't understand
20 that; I don't understand how their products are sold or
21 licensed. All of those things would come up, they would talk
22 about our patents, and then at some point we would hopefully
23 reach a resolution.

24 Q Now, you said during examination that there was some
25 people at Motorola who, during this timeframe, after the

1 lawsuit, were looking to collect these patents. Do you
2 recall that?

3 A Yes.

4 Q And you said there was whatever investigation that could
5 take place during that timeframe, correct?

6 A Yes.

7 Q And I believe you said that you were going to get a better
8 answer from Microsoft as to how the patents apply. What did
9 you mean when you said to the jury, if you were going to get
10 a better answer from Microsoft as to how your patents apply?

11 A So the technology with respect to these standards is
12 complex. The standards are very large. You may use portions
13 of the standard. So 802.11 or WiFi technology has
14 different -- it has 802.11(a) and (b) and (g) and (n). So
15 there is all different types of 802.11 technology. They may
16 use some of it today, they may plan to use other parts of it
17 tomorrow. You don't know what their business plans are.

18 The same with H.264, there are different profiles. I am
19 not an expert, but there is a base profile and there are
20 other profiles. Depending on the equipment you are building
21 and you are trying to provide compatibility with, you use
22 different portions of the specification. So I would
23 assume -- They are in a better place to tell me what they
24 use and how they plan to use it in the future.

25 Q What was your expectation as to the other parties, like in

1 this case Microsoft's incentive to do that?

2 A Obviously they are in the best position to do it, because,
3 number one, they have the resources; they understand their
4 technology better than we understand their technology looking
5 from the outside. And then they obviously want to have a
6 debate about the value of our patents, and whether or not the
7 price we asked was appropriate.

8 Q Were there any particular challenges in trying to come up
9 with an offer to Microsoft as compared with all this other
10 experience that you had?

11 A Sure. So in my licensing experience I had licensed
12 mostly -- in the mobile space the mobile competitors,
13 BlackBerry, Nokia, Samsung, LG, and so we understood the
14 business model, and we licensed their finished good products.
15 The FRAND obligation, the nondiscriminatory part of FRAND,
16 means that I can't treat someone different necessarily. And
17 so I tried -- in that letter I tried to not discriminate, so
18 that my other licensees, who pay on a royalty basis the
19 finished goods, wouldn't be discriminated against if I
20 offered something less than that to Microsoft. And so we
21 tried to incorporate, you know, my practice onto Microsoft's
22 business. It wasn't a perfect fit, but we thought we could
23 talk about that and figure out what an appropriate royalty
24 base was and how we could compensate for that.

25 Q If you look at the letter -- if you look at that first

1 paragraph, you were asked a number of questions that begins
2 with, "This letter is to confirm." Blow up that paragraph.
3 You were asked a number of questions about the 2.25 percent
4 rate.

5 A Yes.

6 Q And you mentioned during your examination that that is a
7 rate Motorola had been using?

8 A Yes.

9 Q Let me ask you this: In your experience when Motorola
10 started out with a 2.25 percent rate offer, was it your
11 experience that that's where it stayed?

12 A No, a lot of it depended on the negotiations. It may stay
13 there. I mean, there are companies that didn't have anything
14 to give back. They thought it was appropriate. So sometimes
15 it stayed, but most of the time someone with a large patent
16 portfolio, like Microsoft, would agree to grant patents back,
17 or we could have any type of relationship, cooperation, so
18 that the amount of money flowing would change. And we had
19 discussions about what the appropriate royalty base is and
20 what the appropriate royalty rate is.

21 Q And when you say you had discussions about the appropriate
22 royalty base, what are you talking about?

23 A So we had asked for a rate based on the end product
24 pricing. But that would be difficult for Microsoft in the
25 case of Windows, which they have talked about. We could talk

1 about a different sort of arrangement. We have done it in
2 other cases where a chipset manufacturer may want a license.
3 We provide them a license, but then we build in defensive
4 protection from their customers if they come after us. We
5 talked about it in regards to Marvell, the draft agreement
6 for Marvell.

7 There is also -- We negotiate caps if we think the money
8 flow is too big. Or we carve out things that are unrelated
9 to the technology. So, as an example, if you put a wireless
10 module into an automobile, we don't charge 2.25 percent on
11 the automobile because it is not directly related to the
12 technology. We have a module licensing program that we would
13 license the module manufacturer if they want to use it in an
14 automobile or in an aircraft or something like that.

15 Q Now, were any of these considerations discussed in this
16 letter, that is royalty caps, other ways of assessing the
17 business to see whether or not the end-product model made
18 sense? Is any of this part of your letter?

19 A No. As I mentioned, we were scrambling, right. They had
20 sued us, we were trying to put patents on the table, we sent
21 this as an initial offer with the hope that we would engage
22 in a negotiation. And we had already set up a meeting for
23 Friday October 22nd, where at least we would start that
24 negotiation.

25 Q I want you to look, if you could, at Exhibit 7242. First

1 I want you to tell me what it is.

2 A This is a copy of a presentation to HTC or High Tech
3 Corporation, which was a mobile device manufacturer.

4 MR. PRICE: Your Honor, I move Exhibit 7242 into
5 evidence.

6 MR. PRITIKIN: I think it has been admitted, your
7 Honor.

8 THE COURT: It hasn't. It is now.

9 (Exhibit 7274 admitted into evidence.)

10 By Mr. Price:

11 Q Mr. Dailey, is this an example of an offer that Motorola
12 made to a potential licensee prior to October 1st, 2010?

13 A Yes. This is a presentation we made in a meeting
14 September 24th, 2009.

15 Q You said this was made to?

16 A HTC or High Tech Computer Corporation.

17 Q If we go to the 11th page, maybe you can explain what is
18 meant by the third bullet point, "Motorola's 2.25 percent
19 standard rate applied to sales"? What does that refer to?

20 A This was applying our 2.25 percent standard rate to what
21 we understood to be HTC's 802.11 or WiFi-enabled equipment
22 that they had sold.

23 Q Now, did this -- was this -- Did this turn out to be a
24 rate that applied just to SEPs?

25 A With respect to -- We -- It just depended on the

1 engagement. So it depended. With some companies we had
2 broader discussions, with other companies they were just on
3 SEPs.

4 Q If you look at the last bullet point there, it says,
5 "Deducted royalties paid under the 2003 agreement; no royalty
6 stacking." What does that refer to within Motorola?

7 A The "no royalty stacking" -- We have identified different
8 portfolios that we believe have 2.25 percent value, which are
9 WiFi, H.264, many of our cellular wireless portfolios, and
10 also wireless e-mail, which is a nonessential patent
11 portfolio that we have -- and smart phone portfolio. So we
12 have different portfolios that we believe were worth
13 2.25 percent, and then depending on what products you were
14 building, you would pay 2.25 percent, but you would only do
15 it once. So if you wanted to use -- if you had a product
16 that used four or five of our portfolios, it was just
17 2.25 percent once, or if you used one of them it was still
18 2.25 percent.

19 Q And when you sent the October 21st, 2010 offer out -- If
20 we can go back to that, Exhibit 1? Was it your expectation
21 that the 802.11 patents that were listed in the Annex to that
22 letter would be the only patents that would be discussed
23 between Microsoft and Motorola?

24 A No. This was the October 21st letter?

25 Q Yes.

1 A We weren't sure, but the expectation was that we were
2 going to have a broader discussion. We were trying to put
3 our patents on the table. If Microsoft only wanted an 802.11
4 license, we would discuss that. But the understanding was
5 that there was a broader peace desired at the time.

6 Q Now, in the second paragraph here, you see it says,
7 "Microsoft is only interested in licensing some portion of
8 this portfolio. Motorola is willing to enter into such a
9 license also on RAND terms." Why was that put in there?

10 A That was put in because, as we discussed, Microsoft -- we
11 weren't exactly sure of all of the uses Microsoft had of our
12 technology. And so if they only used a portion of the spec,
13 like the 802.11(a) or (b), then we could discuss a partial
14 license. It would be unusual to do that, but we offered it
15 because we didn't know what Microsoft would find valuable.

16 Q Did you expect to learn this sort of stuff when you talked
17 to Microsoft?

18 A Yes.

19 Q You see the next paragraph says, "Motorola will leave this
20 offer open for 20 days"?

21 A Yes.

22 Q Why was there a time limit involved here?

23 A In my experience, when you send letters they typically
24 have a time limit so that you elicit a response from the
25 other side within that timeframe, and you don't leave an

1 offer open forever. But the whole idea is to encourage
2 discussion within that timeframe.

3 Q And if you would look at what we have already placed
4 before you, 7252, a loose piece of paper, before the break.

5 A Yes.

6 Q Could you tell us what 7252 is?

7 A 7252 is a letter that I received from David Kaefer, who is
8 the general manager of Microsoft's intellectual property
9 licensing program, offering us a license in August of 2011.

10 MR. PRICE: Move Exhibit 7252 into evidence.

11 THE COURT: I have already noted, over Microsoft's
12 objection, which I have overruled. The exhibit is admitted
13 and may be published.

14 MR. PRICE: Thank you, your Honor.

15 (Exhibit 7252 admitted into evidence.)

16 By Mr. Price:

17 Q You see at the top it appears to be addressed to you on
18 August 1st, 2011. Do you see that?

19 A Yes.

20 Q And if we look at the timeframe, if we are going to put
21 that in there, that would be after Motorola filed a lawsuit
22 in Germany, if this timeline is accurate?

23 A Okay.

24 Q If you go on down, you see the subject is the H.264 patent
25 license?

1 A Yes.

2 Q And just so we can get the topic of the letter that was
3 sent, you go into the second paragraph -- I'm sorry, the
4 first paragraph. My apologies. It says, "This letter is to
5 confirm Microsoft's offer to grant Motorola Mobility, Inc. a
6 worldwide nonexclusive license under Microsoft's portfolio of
7 patents and pending applications covering the subject matter
8 of ITU-T recommendation H.264." Do you see that?

9 A Yes.

10 Q Let me ask you, in your testimony earlier to the jury you
11 talked about grant-backs?

12 A Yes.

13 Q And does this relate to what is referred to as a
14 grant-back?

15 A This was an offer under Microsoft's patents for Motorola
16 to take a license. And it said it would be -- it would ask
17 for reciprocity from Motorola on their patents.

18 Q Reciprocity meaning what?

19 A That we would grant our H.264 patents a license back to
20 them on certain terms.

21 Q Now, when you set out these letters of October 20, 2010,
22 did you expect that Microsoft would also have
23 standards-essential patents which they could assert against
24 Motorola?

25 A Yes. In fact, we were aware that they had H.264 patents,

1 but we didn't know about 802.11. But it was a reasonable
2 expectation they had a large portfolio.

3 Q And in your experience when you send out an offer on a
4 standards-essential patent, what was your experience as to
5 what the other side would do if they had standards-essential
6 patents?

7 A They would respond with, you need to take a license from
8 my patents.

9 Q And would you take that into account in negotiations, in
10 terms of what each party should be doing in terms of rates
11 and money exchanges?

12 A Yeah. I think, if you look at my letter, I tried to
13 indicate that in the letter that we sent to Microsoft,
14 although I have been questioned on it many times. But it was
15 the 2.25 subject to a reciprocal grant-back, which would
16 obviously reduce the amount of money that would be owed by
17 the prospective licensee. Our standard rate was
18 2.25 percent, and then you had to take into account whatever
19 patents you were getting back on that same standard for that
20 rate.

21 Q Would the existence of standards-essential patents on the
22 other side sometimes break down to zero?

23 A Yes. Or in some cases the money flowed in the other
24 direction as well.

25 Q Now, I want to call your attention to another part of this

1 letter in August of 2011. From the last line on, "Microsoft
2 will leave this offer open." Through the signature line.
3 And you see at the end it says, "Microsoft will leave this
4 offer open for 20 days. Please confirm whether MMI accepts
5 the offer." And it is signed by, it looks like, a David
6 Kaefer? Do you know who David Kaefer is?

7 A David was the other person we had spoken to a lot.
8 Horacio and David did a lot of work together.

9 Q By "spoken to a lot," you meant at Microsoft?

10 A Yes. He is the general manager of their intellectual
11 property and licensing group.

12 Q Now, when you saw this line at the end of the letter
13 saying that Microsoft will leave this offer open for 20 days,
14 and please confirm whether MMI accepts the offer, did you
15 believe that this was somehow some sort of setup, or
16 something was wrong with doing this?

17 A No. Actually, what we did was put a response together
18 before the 20 days ran out, and we sent a letter back to
19 Microsoft.

20 Q In your experience is this sort of thing unusual, that is,
21 at the end of the letter leaving the offer open for so many
22 days?

23 A No. It could be 20 or 15 or 30. They are all different.
24 It is a normal practice so that when you receive it you kind
25 of know what the timeframe is you are working within to

1 respond.

2 Q Now, let's go back to Exhibit 1, the October 21st letter.
3 And if we can highlight that last line? How does this
4 language in your letter of October 21st compare with
5 Exhibit 7252, the August 1st, 2011, letter from Mr. Kaefer?

6 A Well, it looks very similar, except who signed it, and
7 then the company. It is Microsoft leaving the offer open.
8 It is a Microsoft letter, and it is Motorola leaving our
9 offer open. So everything else is the same.

10 MR. PRICE: Your Honor, there is another issue I want
11 to go into, but it would require sealing the courtroom.
12 Should I take that up first thing tomorrow perhaps?

13 THE COURT: That would probably be a better plan.

14 MR. PRICE: I will move on for now and come back to
15 another issue, Mr. Dailey.

16 THE COURT: Stop for a second. Let me explain
17 something. Ladies and gentlemen, people who grade my
18 homework, the Ninth Circuit, have some rules about
19 confidential information, confidential documents. The
20 general presumption is the public has a right to know
21 whatever happens in a trial. Otherwise, how would you
22 understand the rulings that come from it? The Court of
23 Appeals and the Supreme Court have carved out an exception to
24 that. That exception will require us to clear out the
25 courtroom, with the exception of you and the lawyers. And we

1 will then talk about that area, and you will hear that
2 testimony. And when that is finished, we will go back into
3 open session, and people are free to come back in again. If
4 you come in here and there is no one here, that's why. It is
5 a process that we try to keep to a minimum, but there is some
6 information that the parties have deemed proprietary or
7 confidential, and we are obligated to acknowledge that.

8 Thank you, Mr. Price.

9 By Mr. Price:

10 Q Mr. Dailey, getting back to the question I asked you
11 before when I asked you to compare the language, we now have
12 that up on the screen, the language from Microsoft's
13 August 1, 2011, letter, and the letter that you sent
14 October 21st, 2010. Seeing those together, what would you
15 say the differences were?

16 A Just the names of the parties were reversed. So it is now
17 Motorola leaving an offer open, which was the original
18 letter, and now Microsoft sent us a letter, and it says
19 Microsoft will leave this offer open for 20 days.

20 Q Let's get back then to what happened. We have the
21 timeline and we have your October 21st letter going out. You
22 told us you didn't expect an acceptance. What did you
23 expect?

24 A On the October 21st letter?

25 Q Yes.

1 A We expected a response. They had already said, put your
2 patents on the table. We were going to meet them on the 22nd
3 to talk about -- Well, we didn't know. We hadn't been
4 invited up there to talk about what we were going to do to
5 resolve this litigation that they had filed against us. But
6 we expected a negotiation and a response.

7 Q Let's talk about the 22nd, the next day --

8 A Sure.

9 Q -- after you sent this. First of all, do you know when
10 Microsoft got the letter?

11 A They at least had it -- received it on the morning we met
12 them, on the 22nd.

13 Q How do you know that?

14 A They told us they received it when we met with them on the
15 22nd.

16 Q Let's describe this meeting. You came to Seattle?

17 A We did, yes.

18 Q And you say "we." Who came with you?

19 A Scott Offer, who was the general counsel of Motorola
20 Mobility. And we met with Brad Smith, the general counsel of
21 Microsoft, and Horacio Gutierrez, the head of licensing for
22 Microsoft.

23 Q How did you get from the Seattle airport here to
24 Microsoft?

25 A Microsoft was being overtly friendly. They had arranged

1 for a limousine to pick us up from the airport and bring us
2 to their meeting place. They served a very nice lunch at the
3 meeting place. I just remember Brad Smith shaking my hand
4 with both of his hands and; you know, thank you for coming,
5 and we hope we can get this resolved quickly. It was a
6 little bit odd, but that's what happened.

7 Q What do you mean it was "odd"? Why do you think it was
8 odd?

9 A I don't conduct licensing meetings quite in the same way.
10 It was just different. It was out of norm from my
11 experience.

12 Q Let's talk about then -- You get to the Microsoft
13 facility here, right?

14 A Yes.

15 Q When you got there and you met Mr. Gutierrez and
16 Mr. Smith, was there any discussion about the October 21st,
17 2010, letter?

18 A Just a note that they received our gift. It was a bit of
19 a joke at the beginning of the meeting.

20 Q And who made this joke that they had received your gift?

21 A That was Horacio.

22 Q Mr. Gutierrez?

23 A Yes.

24 Q Now, when Mr. Gutierrez talked to you after this joke, at
25 any time did Microsoft say that this letter was outrageous or

1 violated some commitment?

2 THE COURT: Mr. Price, you are leading. You need to
3 stop that. The next time I will strike the question and I
4 will admonish you formally in front of the jury. We have
5 gone through this three times now.

6 Ladies and gentlemen, this witness is now a friendly
7 witness, and the lawyer can't lead. He can ask him, what
8 happened at the meeting? But he doesn't get to say, did this
9 happen, did this happen, did this happen. That's why I am
10 admonishing Mr. Price to stop doing that. He is going to
11 stop.

12 By Mr. Price:

13 Q Let me ask you the correct question, which is, what
14 happened after the joke about "we received your gift"?

15 A Nothing. We just continued on discussing the meeting.
16 There was no other commentary about the letter that they had
17 received or whether or not there were any issues with the
18 letter.

19 Q So what issues were talked about at the meeting?

20 A They talked a lot about their pillars, that they wanted to
21 tax Android -- I don't know if I am free to talk about the
22 rates that we discussed. But they talked about -- I don't
23 want to --

24 Q Let's not for right now, because I'm not sure what you are
25 talking about. Go ahead.

1 A They said they wanted to get certain royalties for our use
2 of Android. They understood that we had patents, and they
3 had received the first list today; they were looking forward
4 to us putting our patents on the table, putting them hard on
5 the table; it may even require litigation, they understood
6 that; and they wanted a quick resolution, and they wanted us
7 to be friends. They wanted the CEOs to be up on a stage and
8 shake hands and say that we have agreed to take -- pay
9 royalties on Android for the Android operating system.

10 Q What did they say about this might require litigation?

11 A They just said, you know, you need to put your patents on
12 the table, you may need to put them on hard so we can
13 acknowledge the value of those patents in an arrangement.

14 Q Do you recall anything else that happened at this meeting
15 on October 22nd?

16 A The rest of the meeting was -- it was very cordial, very
17 friendly. We had lunch, like I talked about. We
18 chitchatted. And they said, we look forward to receiving
19 your patents and having further discussions.

20 Q When you left the meeting -- I will ask it this way: How
21 was the meeting terminated? How was it left? What were you
22 to do?

23 A It was expected that -- We left the meeting, we went back
24 to our plane and flew back to Chicago --

25 Q Hold on.

1 A They expect --

2 Q Just a second. Let me ask a question so you have
3 something to respond to. I want to focus at the end of the
4 meeting, how the meeting was rather than what you did. At
5 the end of the meeting, how was it left?

6 A It was left that Horacio and I would go work on a
7 framework for settling the patent disputes and put patent
8 peace between the two companies.

9 Q Any further scheduling?

10 A No, there were no other meetings scheduled at that time.
11 It was just -- We needed a few weeks to put our patents on
12 the table. We expressed we were scrambling a bit.

13 Q When you said you expressed you were scrambling, what did
14 you say?

15 A We generally talked about we were surprised by the
16 lawsuit, and that we were scrambling to put our patents on
17 the table, and we would do that as quickly as we could.

18 MR. PRICE: Your Honor, I will check with my
19 colleagues about the material that I am going to see if it
20 can be said in open court.

21 THE COURT: Talk to Mr. Pritikin, where this is
22 going, so he is not surprised. Thank you, counsel.

23 By Mr. Price:

24 Q Mr. Dailey, we have the all-clear now for this question.
25 You earlier were talking about rates that were discussed in

1 the October 22nd meeting --

2 A Yes.

3 Q -- by Microsoft. Can you tell us what was discussed in
4 that regard?

5 A Sure. There was discussion around -- Brad Smith was very
6 adamant they were looking for \$5 a unit for every Android
7 handset that we shipped, but he wanted to pay us for our
8 patents, but we had to put our patents on the table so he
9 could understand how much. And we asked a lot of questions
10 about, are you going to pay us this much? Recognizing the
11 fact that Microsoft was, you know, rough and tough, six to
12 eight times our size in sales, and we both had substantial
13 patent portfolios, we were curious about how that royalty
14 flow would go. Because at the time Motorola Mobility wasn't
15 making any money, so it was very difficult for us to stomach
16 a \$5 per unit tax on every unit we shipped.

17 Q Now, you just mentioned that you were wondering about
18 which way the money would flow given Microsoft was selling
19 more products. How would that have anything to do with which
20 way the money would flow?

21 A So all of these bilateral cross-license arrangements, you
22 have discussions about the use of, you know, your patents by
23 the other company, and our use of their patents by us, and
24 then you talk about the relative value. And, obviously, the
25 more software and devices that you sell the more royalties

1 that would naturally flow from the other company to you; and
2 vice-versa, that money would flow from us for use of their
3 patents.

4 Q What specifically, if anything, was said during this
5 conversation about that -- you kind of used your fingers and
6 went like this.

7 A Yeah, that is exactly what the conversation was about,
8 were we going to get money or were they. There was no
9 conclusion to that, as to which way the money would flow. So
10 it was left open.

11 Q After this October 22nd meeting, were there later
12 discussions about that?

13 A Yeah. We had many engagements with Horacio and David
14 Kaefer and myself to talk with Microsoft. We exchanged term
15 sheets. We met with them I think a half dozen times before
16 the end of the year, between kind of mid-November through the
17 end of the year. There was a lot of discussions on terms as
18 to what patents would be included, what products would be
19 licensed, and the scope, this five or six years, seven years,
20 and then the relative exchange of financials was discussed as
21 well.

22 Q Now, in the discussions -- You said there were some
23 discussions up through the end of the year -- Let me ask
24 this again. Were there any discussions for the remainder of
25 the year?

1 A There were, yes.

2 Q About how many?

3 A So I think a half dozen through the end of the year. They
4 started after the third lawsuit Microsoft filed, this one.

5 Q Focusing on that, what focus was there in those
6 discussions on the October 21st letter or the October 29th
7 letter?

8 A So the discussions -- the term sheets were about -- There
9 were some exclusions, but it was all Microsoft patents for
10 use in certain Motorola devices, and all of Motorola's
11 patents for use in Microsoft devices, and then there was
12 discussion as to whether it would apply to all of Microsoft's
13 devices or some of Microsoft devices. And so there was a
14 debate about which products would be covered, but it was all
15 of the patents.

16 And then there was -- the revenue flow or the money flow
17 was debated. Not surprisingly, through the end of the year
18 Microsoft always suggested that money should flow to them,
19 and I think at that time I suggested all of the money should
20 -- the relative money should flow to us. We were trying to
21 get to a zero/zero -- we were really trying to get a
22 royalty-free cross license with freedom for the businesses to
23 make their products. That was the goal.

24 Q You mentioned "zero/zero." I want to make sure the jury
25 understands what your goal was here. What do you mean you

1 said you were looking for a zero/zero?

2 A We were trying to get to a place where Microsoft would
3 have access to the Motorola patents to build products, and we
4 would have access to Microsoft products to build our
5 products, and the relative exchange of money would be zero.
6 So maybe we pay them money, but maybe they pay us back. We
7 weren't really tied up in the mechanism, but we were looking
8 at zero/zero is where the relative money flow is even. It is
9 effectively not paying anything for access.

10 Q If you would look at the timeline, you see it says,
11 "November 8th, 2010, Microsoft Windows Phone 7 handset in
12 stores." Do you have any knowledge as to when these
13 Microsoft Windows Phone 7 handsets were in fact in the
14 stores?

15 A They were in the November 8th timeframe, yes.

16 Q And how were you aware of that?

17 A I read about it, and we discussed it. It was very widely
18 publicized.

19 Q And on November 9, 2010, it says, "Microsoft sues for the
20 third time." Do you see that?

21 A Yes.

22 Q Did you become aware around that time, November 9, 2010,
23 Microsoft filed its third lawsuit?

24 A I did. I was aware of that. And there were phone calls
25 within Motorola, between Brad Smith and Scott Offer as well.

1 Q Let me ask you, were you present during those phone calls?

2 A No.

3 Q So you don't have any firsthand knowledge as to what was
4 said in those phone calls?

5 A That's correct.

6 Q And after Microsoft sued for the third time, after that --
7 I am treading lightly here. About how many discussions did
8 you guys have through the end of the year trying to resolve
9 this on a business level?

10 A My recollection is there was approximately a half dozen
11 phone calls and meetings and exchanges between -- at least a
12 half dozen, with Microsoft.

13 Q Now, in the examination that was done by Microsoft, there
14 were some questions about figures in the billion dollar range
15 of royalties going to Motorola. Could you tell me what kind
16 of discussions there were about the magnitudes?

17 A Yeah. As I said, our goal was to get to zero/zero. The
18 magnitude of payments -- Microsoft wanted money flowing in
19 their direction for Android. It was very important for them.
20 So they always wanted the \$5. At other times it was \$12 and
21 \$22 for devices using their patents. But they wanted that
22 money flowing to Microsoft, for whatever reason. And so we
23 were asking for money in return. It was in the hundreds of
24 millions. And the hope was, based on our projections, that
25 it would be a zero/zero.

1 There were other mechanisms we talked about, which were
2 caps. At one time I think Horacio proposed that \$600 million
3 -- that once someone had paid a net \$600 million to the other
4 party that the agreement would end. So there were different
5 mechanisms that we talked about. But we never talked about
6 billions of dollars flowing in any one direction, as a
7 net/net thing.

8 Q You just mentioned something called a "cap." Is that a
9 concept which you had seen before in licensing negotiations?

10 A Yeah, many agreements -- depending on the success of one
11 company versus the other, the differential payments get
12 large, and then companies aren't comfortable agreeing to such
13 licenses, because they plan on being successful and they
14 don't want to pay too much money. So they negotiate an
15 enterprise cap where their company won't pay more than X
16 dollars, whatever that cap is that they are comfortable with.
17 So it is all about getting the other party comfortable with
18 the terms, and so caps are used as a mechanism in licensing
19 agreements quite often.

20 Q And let me ask you, in terms of your experience -- We
21 have talked about a royalty rate applying to an end product,
22 right? Why was that part of Motorola's standard offer as it
23 would apply to an end product?

24 A You know, my experience was licensing in the mobile space,
25 and we were licensing end product manufacturers. So the

1 value of our licenses were associated with the end products.
2 If we wanted to go into a -- if a license was requested by a
3 component manufacturer, you had to still be
4 non-discriminatory and keep it at the level of the end
5 product. And so we would license at that. That's why the
6 letters indicated that the value we were looking for was at
7 the end product, knowing we would negotiate something that
8 was rational for the component supplier. And we had done
9 that before with other component suppliers.

10 Q And can you give an example without giving any
11 confidential information?

12 A Sure. We have a license with Qualcomm that is a component
13 supplier -- a large component supplier in the cellular space.

14 THE COURT: Mr. Price, are you certain on Qualcomm
15 before you launch into that?

16 MR. PRICE: I am not going to go into any more
17 detail. I understand that.

18 By Mr. Price:

19 Q I will just ask, what was the purpose of the cap in that
20 situation?

21 A There were a number of provisions that we would negotiate,
22 similar to what we have suggested in Marvell, which is,
23 provides freedom of action, so that if we license a component
24 manufacturer their customers didn't sue us. And then the
25 purpose of the cap was to cap the amount of value that would

1 go from a component manufacturer to us, because that's what
2 they were willing to pay.

3 THE COURT: Is this a good time to stop?

4 MR. PRICE: This would be fine, your Honor.

5 THE COURT: Ladies and gentlemen, I am going to let
6 you retire to the jury room. I have some brief matters to
7 take up with the lawyers about tomorrow. Thank you for a
8 great deal of attention today. Hopefully you now know how
9 much fun this is, and we will look forward to seeing you
10 tomorrow. The lawyers have done a nice job of using your
11 time wisely, and I appreciate that, and I know you do also.

12 I'm sure none of you will remember what I am about to tell
13 you. Remember, until the trial is over, do not discuss this
14 case with anyone, including your fellow jurors, members of
15 your family, people involved in the trial or anyone else, and
16 do not allow others to discuss the case with you. This
17 includes discussing the case in internet chat rooms or
18 through internet blogs, internet bulletin boards, e-mails or
19 text messaging. If anyone tries to communicate with you
20 about the case, please let me know about it immediately. Do
21 not read, watch or listen to any news reports or other
22 accounts about the trial or anyone associated with it,
23 including any online information.

24 I will warn you that apparently, at least in the online
25 version of the Seattle Times, there was a story. If you

1 want, have your family members save all of those editions,
2 and when the trial is over you can read about yourselves.
3 But don't do it until then.

4 Please do not conduct any research, including consulting
5 dictionaries, searching the internet or using other reference
6 materials, and do not make any investigation about the case
7 on your own.

8 Finally, keep an open mind until all of the evidence has
9 been presented, and you have heard the arguments of counsel,
10 my instructions on the law and the views of your fellow
11 jurors. If anyone needs to speak to me about anything,
12 simply give a signed note to the clerk to give to me.

13 The same rules as this morning, we need to have you here
14 about 8:50 so that we know you are all here. And you all
15 know how hard it is, so I won't remind you about that.

16 Ladies and gentlemen, please rise for the jury.
17 (At this time the jury left the courtroom.)

18 THE COURT: Counsel, I think I have four matters to
19 take up with you. Mr. Price, I don't know who else is going
20 to be examining witnesses. My rule on leading is, I allow a
21 fairly substantial amount of it, as long as it is
22 foundational stuff. When you are getting into the more key
23 details, you need to not lead.

24 MR. PRICE: I understand.

25 THE COURT: Understand that is a rule that I enforce.

1 I roughly think that you used today -- let's see, Microsoft
2 used two hours and 55 minutes, and Motorola used two hours
3 and 35 minutes. So for whoever is keeping track of your
4 time, that was my -- those are my rough notes, but I have a
5 fairly elaborate way of keeping track of this, down to when
6 you stop talking. I think that is fairly accurate.

7 What is our confidential matter for tomorrow, what kind of
8 matter?

9 MR. PRICE: It is the RIM contract.

10 THE COURT: How long do you expect that to take?

11 MR. PRICE: Ten minutes.

12 THE COURT: All right. Then at 9:00 when you come in
13 we will exclude the audience until that information is
14 presented. Wherever you are, Mr. Pritikin. How long do you
15 expect -- Do you expect any cross-examination on that?

16 MR. PRITIKIN: I do, obviously, because they have
17 essentially done their direct now. It would be longer than a
18 normal redirect --

19 THE COURT: Just on RIM?

20 MR. PRITIKIN: Oh, on RIM? I'm sorry. Perhaps five
21 minutes, maybe ten.

22 THE COURT: People, if you are coming, think about
23 9:15 or so. We won't be taking a break. So if we don't have
24 the door barricaded, you are welcome to come in; otherwise,
25 there will be a note on it saying that we are in closed

1 session.

2 Who are our witnesses for tomorrow?

3 MR. HARRIGAN: Your Honor, I think it is Garrett
4 Glanz. And then we have two depositions, Ms. Ochs, who will
5 be played by Patty Eakes. And then we have Mr. Davidson,
6 Taylor and Curtis, Mr. Gutierrez -- if we get to him,
7 Mr. Gutierrez, and after that Mr. Davidson.

8 THE COURT: I stopped on Ms. Ochs. Taylor is next?

9 MR. PRITIKIN: Your Honor, it may depend in part on
10 when they finish with Mr. Dailey. I don't know how long that
11 is going to run.

12 THE COURT: We will find out in a moment.

13 MR. PRITIKIN: The other witnesses we have tomorrow
14 are -- the live witnesses are Glanz and Gutierrez, and then
15 there is the Ms. Ochs' testimony, and then there are three
16 depositions that would include Taylor, Blasius and Curtis.

17 THE COURT: All right.

18 MR. PRITIKIN: What I would -- We will talk to them
19 this evening. It may be that we can -- perhaps, in light of
20 the testimony today, we may be able to shorten some of these
21 deposition designations. We will talk about that and see if
22 we can avoid inflicting that on the jury.

23 THE COURT: Mr. Price, any idea on how much longer
24 you will be with Mr. Dailey?

25 MR. PRICE: I hope not more than a half hour. It is

1 on the clock.

2 I would like to ask a question about order. The parties
3 have agreed to tell each other the order of the witnesses two
4 days in advance. And there has been some change that we are
5 just learning about. We were told last night that
6 Mr. Gutierrez would be first, and then Mr. Davidson after it
7 looks like a number of depositions. I am just wondering what
8 has changed.

9 THE COURT: Counsel, that is a discussion you all can
10 have. I don't need to be out here. If you can't figure it
11 out, talk to me tomorrow morning, and I will figure it out
12 for you.

13 MR. PRICE: Okay.

14 THE COURT: Other than that, we will be in recess. I
15 will see you at 9:00 tomorrow.

16 MR. PALUMBO: Your Honor, one quick matter. In the
17 Jennifer Ochs deposition, there were a number of exhibits
18 that were admitted in the last trial. There has been no
19 objection. Would you like us to move those exhibits into
20 evidence now or are they already considered in evidence?
21 Once we start reading we just want to be able to publish the
22 exhibits as we are reading through the deposition.

23 THE COURT: Why don't you all discuss it between
24 yourselves and figure that out. And if you can reach
25 agreement, great. If not, I will reach one for you.

1 MR. PALUMBO: Okay.

2 THE COURT: We will be in recess. Thank you,
3 counsel.

4 (The proceedings recessed for the day.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

We, Barry Fanning and Debbie Zurn, Official Court Reporters for the United States District Court, Western District of Washington, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

DATED this ^ day of August, 2013.

/s/ Barry Fanning

/s/ Debbie Zurn

Barry Fanning, Court Reporter

Debbie Zurn, Court Reporter